90-813

No. 90-

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

HOUSTON LAWYERS' ASSOCIATION, *et al.*,
Petitioners,

v.

JIM MATTOX, *et al.*,
Respondents.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

JULIUS LEVONNE CHAMBERS
*CHARLES STEPHEN RALSTON
SHERRILYN A. IFILL
99 Hudson Street
Sixteenth Floor
New York, N.Y. 10013
(212) 219-1900

GABRIELLE K. MCDONALD
301 Congress Avenue
Suite 2050
Austin, Texas 78701
(512) 320-5055

Attorneys for Petitioners

Of Counsel:
MATTHEWS & BRANSCOMB
A Professional Corporation

* *Counsel of Record*

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 90-8014

LEAGUE OF UNITED LATIN AMERICAN CITIZENS COUNCIL NO. 4434,
Plaintiffs-Appellees,

and
JESSE OLIVER, ET AL.,
Intervening
Plaintiffs-Appellees,
versus
WILLIAM P. CLEMENTS, ETC., ET AL.,
Defendants,
JIM MATTOX, ET AL.,
Defendants-Appellees,
Appellants,
versus
JUDGE F. HAROLD ENTZ, ETC.,
JUDGE SHAROLYN WOOD, ETC.
and GEORGE S. BAYOUD, JR., ETC.,
Defendants-Appellants,
and
TOM RICKHOFF, SUSAN D. REED, JOHN J. SPECIA, JR., SID L. HARLE, SHARON MACRAE and MICHAEL P. PEDAN, Bexar County, Texas State District Judges,
Appellants.

Appeal From the United States District Court
for the Western District of Texas

(September 28, 1990)

Before , Chief Judge,
GEE, POLITZ, KING, JOHNSON, JOLLY, HIGGINBOTHAM, DAVIS, JONES, SMITH, DUHE, WIENER, AND BARKSDALE, Circuit Judges.* GEE, Circuit Judge:

Today we must decide whether Congress, by amending Section 2 of the Voting Rights Act in 1982 to add a "results" test for dilution of minority voting strength, meant to subject the selection of state judges to the same test as that for representative political offices by incorporating language from the Supreme Court decision in White v. Regester.[1] For reasons to be given -- and for the cardinal reason that judges

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*Judges Williams and Garwood took no part in the Court's deliberations or decision of this appeal. When this case was orally argued before and considered by the court, Judge Reavley was in regular active service. He participated in both the oral argument and the en banc conference.

In *United States v. American-Foreign Steamship Co.*, 363 U.S. 685, 80 S.Ct. 1336, 4 L.Ed.2d 1491 (1960), the Supreme Court, interpreting 28 U.S.C. § 371(b), decided which senior judges are eligible to participate in an en banc court. Compare United States v. Cocke, 399 F.2d 433, 435 n.4 (5th Cir. 1968) (en banc). As Judge Reavley reads the *American-Foreign Steamship Co.* opinion, he considers himself ineligible now to participate in the decision of this case, and he has not therefore done so.

[1] 412 U.S. 755 (1973).

need not be elected at all -- we conclude that it did not.

In summary, these are that Congress was at great pains to phrase the new Section 2 in such language as to make clear that its results test applies to voting in elections of *representatives* only; that as of the amendment's time judicial offices had never been viewed by any court as representative ones; that characterizing the functions of the judicial office as representative ones is factually false -- public opinion being irrelevant to the judge's role, and the judge's task being, as often as not, to disregard or even to defy that opinion, rather than to represent or carry it out; that, because of the highly intrusive nature of federal regulation of the means by which states select their own officials, legislation doing so should not be pushed beyond its clear language; and that, in view of these considerations, we should place such a construction on the 1982 enactment reluctantly and only if Congress has clearly mandated such a singlar result.

We have carefully weighed the text and provenance of the statutory language against the opposing factors urged upon us as interpretive guides. Having done so, we conclude that the language of the 1982 amendment is clear and that it extends the Congressional non-Constitutional "results" test for vote dilution claims no further than the legislative and executive branches, leaving the underlying, Constitutional "intent" test in place as to all three. Especially telling, we conclude, is the circumstance that in borrowing language from the Court's *White* opinion Congress focused upon its reference to electing "legislators," broadening it so far, but only so far, as to electing "representatives," a term inclusive of elective members of the executive branch as well as of the legislature but not -- as, say, "state officials" would have been -- of members of the judiciary. That Congress did exactly as we have described is as undeniable as it is inexplicable on any basis other than that of a legislative purpose to include all elected

legislative and executive state officials but to exclude elected judges.

Finally, and bearing in mind the well-settled principle of statutory construction that the enacting Legislator is presumed to have been aware of the judicial construction of existing law,[2] we note that, as of the time of the addition of Section 2(b) and of the explicit results test to the Voting Rights Act, every federal court which had considered the question had concluded that state judges were not "representatives" and did not fall within the definition of that term. Had Congress, then, meant to exclude votes in judicial elections from the ambit of its new results test, it could scarcely have done so more plainly than by adopting the term "representative" to describe that ambit.

Facts and Procedural History

The underlying facts of this appeal are carefully and

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[2] *See, e.g., Shapiro v. United States*, 335 U.S. 1, 16 (1948); United States v. PATCO, 653 F.2d 1134, 1138 (7th Cir.), cert. denied, 454 U.S. 1083 (1981).

correctly set out in the panel opinion, 902 F.2d 293 (5th Cir. 1990); we recapitulate them here no further than is necessary to an understanding of what we write today.

Plaintiffs attacked the Texas laws providing for countywide, at-large election of judges of the trial court of general jurisdiction, asserting that the imposition of a single-member system was necessary to prevent dilution of black and Hispanic voting strength. In a bench trial, the federal court rejected their constitutional arguments grounded in the Fourteenth and Fifteenth Amendments, finding a failure to prove the requisite discriminatory intent for relief under those provisions. The court determined, however, that the Texas law produced an *unintended* dilution of minority voting strength, a circumstance sufficient to call for relief under the Voting Rights Act, as amended in 1982 to incorporate a "results" test dispensing with the necessity of proof of discriminatory intent. In consequence, and after pausing to allow for possible remedial action by the state,

the court enjoined further use of the at-large system, confected and imposed a system of single-member elections, and directed that these be held last Spring.

On appeal, we stayed the court's order, expedited the appeal, held a panel hearing on April 30, and handed down an opinion on May 11. Four days later, pursuant to a majority vote of active judges, we ordered rehearing of the appeal en banc; and we now render our opinion.

Analysis

The Panel Opinion

At the time of its decision, our panel was constrained by an earlier decision of the Circuit holding that Section 2 of the Act applied to elections held to fill positions on the Louisiana Supreme Court, a seven-member body.[3] Chisom v. Edwards, 839 F.2d 1056 (5th Cir. 1988). Constraint was superfluous, however; for the panel embraced and agreed with the holding and reasoning of *Chisom* applying the Act

[3] It is the settled law of our Circuit that one panel of the Court does not overrule another. *Ryals v. Estelle*, 661 F.2d 904 (5th Cir. 1981).

to judicial elections. It went on, however, to conclude that although in its view judges were indeed "representatives of the people," and although as their representatives the judges' elections were controlled by Section 2(b) of the Act, the elections of *trial* judges were not subject to voter-strength dilution concerns because their offices are single-member ones; and there is no such thing as a "share" of a single-member office. *LULAC v. Clements*, 902 F.2d 293, 305 (5th Cir. 1990). *See* Butts v. City of New York, 779 F.2d 141 (2d Cir. 1985), *cert. denied*, 478 U.S. 1021 (1986) (offices of mayor, council president, comptroller are single-member ones) and United States v. Dallas County, Ala., 850 F.2d 1433 (11th Cir. 1988) (county probate judge). A vigorous dissent by Judge Johnson, author of the panel opinion in *Chisom*, disputed the panel majority's characterization of judges from multi-judge districts as holders of single-member offices. We need not resolve this disagreement within the panel, however, as we do not reach

the issue.

Statutory Background

Originally enacted in 1965 as an anti-test, anti-device provision to relieve blacks of state-law strictures imposed upon their Fifteenth Amendment voting rights, Section 2 of the Voting Rights Act was construed by the Supreme Court in Mobile v. Bolden, 446 U.S. 55 (1980), as adding nothing to the Fourteenth and Fifteenth Amendment claims there made and as requiring, for its enforcement, proof of racially-discriminatory intent. At the time of *Bolden*, Section 2 read:

> No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title.

Congress reacted to *Bolden* by amending Section 2 to add to the statute a limited "results" test, to be applied and administered "as provided in subsection (b) of this section." As amended, Section 2 was cast in two subsections:

> (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, as provided in subsection (b) of this section.
>
> (b) A violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: Provided, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

Earlier, in the course of deciding *White*, a 1973 voting rights case invoking constitutional grounds, the Court had described the required standard of proof in felicitous terms:

> The plaintiffs' burden is to produce evidence to support findings that the political processes leading to nomination and election were not equally open to participation by the group in question -- *that its members had less opportunity than did other residents in the district to participate in the political processes and to elect legislators of their choice.*

412 U.S. at 766 (emphasis added). Casting about for appropriate language in which to couch its new subsection, and having inserted the reference to results in old Section 2, Congress settled upon the italicized portion of Justice White's opinion quoted above, adopting it with only one significant alteration.

New subsection (b), then, is patterned on the *White* court's language and provides with great specificity how violations of the newly incorporated results test must be established: a violation is shown on a demonstration, by the totality of the circumstances, that state (or political subdivision) nomination and election processes for representatives of the people's choice are not as open to minority voters as to others. The precise language of the

section is significant; a violation is shown, it declares, if it is established that members of the protected classes

> have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.[4]

Both the broad and general opportunity to participate in the political process and the specific one to elect representatives are thus treated in the new section.[5] As for the former, protecting it appears to involve all of the primal anti-test, anti-device concerns and prohibitions of original Section 2; and its provisions may well extend to all elections whatever, as did they.[6] These broader considerations center

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[4] As we note in text, the section goes on to specify that election success of class members is a circumstance to be considered and to disavow specifically any intent to mandate proportionate representation by race.

[5] Not all aspects of that process pertain to elections, *e.g.*, the celebrated New England town meeting.

[6] That scope is not at issue today, the trial court having found an absence of discriminatory intent; and we do not decide it. We point out, however, that there can be no doubt whatever that the provisions of the Fourteenth and Fifteenth Amendments, enforceable by means of Section 1983 actions, apply to judicial elections to forbid intentional discrimination in any aspect of them. *City of Mobile v. Bolden*, 446 U.S. 55 (1980); *Voter Information Project v. City of Baton Rouge*, 612 F.2d 208 (5th Cir. 1980).

on the voter and on his freedom to engage fully and freely in the political process, untrammeled by such devices as literacy tests and poll-taxes. Where judges are selected by means of the ballot, these safeguards may apply as in any other election, a matter not presented for decision today. The second consideration -- opportunity to elect representatives of one's choice -- is also couched in the language borrowed from White v. Regester, 412 U.S. 755, 766 (1973); and, as we have noted, the Congress was at some pains to adapt and broaden the Court's phrases so as to convey its precise meaning. Before pursuing this aspect of our inquiry further, however, we turn aside to consider briefly the nature of the judicial office and two other closely related topics: judicial selection and the state of authority on judges' status as representatives.

The Judicial Office

Senators and members of the House of Representatives hold clearly political offices. Today, both are directly elected by the people; and it is their function as representatives to synthesize the opinions of their constituents and reflect them in the debate and deliberation of public issues.[7] The executive branch of the government, headed by our highest officer elected at large in the nation, is also expected to bring the views and opinions which he offered

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[7] James Madison, discussing the unquire relationship of the representative to his constitutents, for example, referred to a relationship of "intimate sympathy" between the elected and his electors, and argued that a legislator should fee an "immediate dependence" upon the will of his constituents. Frequent elections, according to Madison, are the only way to ensure this sort of relationship. Only by requiring legislators to return periodically to their constituents to seek their ongoing support and input, can the communication between the voters and their representatives that is essential to the maintenance of democratic government take place. Congress is a "popular" institution; it is, therefore inherently political.

Hickok, Judicial Selection: *The Political Roots of Advice and Consent* in Judicial Selection: Merit, Ideology, and Politics 4 (National Legal Center for the Public Interest 1990).

the electorate in seeking the Presidency to bear on the job of running the federal machinery.

By contrast, the judiciary serves no representative function whatever: the judge represents no one.[8] As Professor Eugene Hickok has recently observed, in terms upon which we cannot improve:

> The judiciary occupies a unique position in our system of separation of powers, and that is why the job of a judge differs in a fundamental way from that of a legislator or executive. The purpose of the judiciary is not to reflect public opinion in its deliberations or to satisfy public opinion with its decisions. Rather, it is to ensure that the ordinary laws do not run contrary to the more fundamental law of the Constitution, to resolve disputes and controversies surrounding the law, and to resolve disputes among contesting parties over the meaning of the law and the Constitution. If a member of congress serves to

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[8] That this is the case is strongly implied in the Constitution, which provides for an appointive federal judiciary and was adopted by thirteen states, none of which had an elective one. Yet the Framers believed they were confecting a federal republic, and Article 4, Section 4, of the Constitution guarantees "to every State in this Union a Republican Form of Government. . . ." But if judges hold representative offices, or represent any constituency, appointing them is scarcely consistent with a republican system, defined by the Third Edition of Webster's Unabridged as "[A] government in which supreme power resides in a body of citizens entitled to vote and is exercised by elected officers and representatives . . . ."

> make the law and a president to enforce it, the judge serves to understand it and interpret it. In this process, it is quite possible for a judge to render a decision which is directly at odds with the majority sentiment of the citizens at any particular time. A judge might find, for example, a very popular law to be unconstitutional. Indeed, it can be argued that the quality most needed in a judge is the ability to withstand the pressures of public opinion in order to ensure the primacy of the rule of law over the fluctuating politics of the hour.

Hickok, *op. cit. supra* n.7, at 5.

Thus the scholar, and with one voice the case authority of the time agreed. In 1982, as of the time of Congress's adoption of the Court's language from *White*, at least fifteen published opinions by federal courts -- opinions which we list in the margin -- had held or observed that the judicial office is not a representative one, most often in the context of deciding whether the one-man, one-vote rubric applied to judicial elections.[9] Not one had held the contrary.

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[9] *Sagan v. Commonwealth of Pennsylvania*, 542 F. Supp. 880 (W.D. Pa. 1982), *appeal dismissed*, 714 F.2d 124 (3rd Cir. 1983)

(cross filing permitted by candidates for judicial office, prohibited for legislative and executive candidates)

Concerned Citizens of Southern Ohio, Inc. v. Pine Creek Conservancy Dist., 473 F. Supp. 334 (S.D. Ohio 1977)

The Ripon Society, Inc. v. National Republican Party, 525 F.2d 567 (D.C. D.C. 1975), *cert. denied*, 424 U.S. 933, 47 L.Ed.2d 341 (1976)

Fahey v. Darigan, 405 F. Supp. 1386 (D.C.R. I. 1975)

Gilday v. Board of Elections of Hamilton County, Ohio, 472 F.2d 214 (6th Cir. 1972)

Wells v. Edwards, 347 F. Supp. 453 (M.D. La. 1972), *aff'd mem.*, 409 U.S. 1095, 34 L.Ed.2d 679 (1973)

Buchanan v. Gilligan, 349 F. Supp. 569 (N.D. Ohio 1972)

Holshouser v. Scott, 335 F. Supp. 928 (M.D.N.C. 1971), *aff'd mem.*, 409 U.S. 807, 34 L.Ed.2d 68 (1972)

Sullivan v. Alabama State Bar, 295 F. Supp. 1216 (M.D. Ala.), *aff'd per curiam*, 394 U.S. 812, 22 L.Ed.2d 749 (1969) (involving Board of Commissioners of Alabama State Bar)

Irish v. Democratic-Farmer-Labor Party of Minnesota, 287 F. Supp. 794 (D.C. Minn.), *aff'd*, 399 F.2d 119 (8th Cir. 1968)

Buchanan v. Rhodes, 249 F. Supp. 860 (N.D. Ohio 1966), *appeal dismissed*, 385 U.S. 3, 17 L.Ed.2d 3 (1966), and *vacated*, 400 F.2d 882 (6th Cir. 1968), *cert. denied*, 393 U.S. 839, 21 L.Ed.2d 110 (1968)

N.Y. State Assn. of Trial Lawyers v. Rockefeller, 267 F. Supp. 148 (S.D.N.Y. 1967)

Kail v. Rockefeller, 275 F. Supp. 937 (E.D.N.Y. 1967)

Romiti v. Kerner, 256 F. Supp. 35 (N.D. Ill. 1966)

Stokes v. Fortson, 234 F. Supp. 575 (N.D. Ga. 1964)

Typical of these is the opinion in Wells v. Edwards, a decision by a three-judge district court from our own circuit which was affirmed on appeal by the Supreme Court.[10] There, after reviewing various authorities, the district court expressed the entire rationale of its view as follows:

> "Judges do not represent people, they serve people." Thus, the rationale behind the one-man, one-vote principle, which evolved out of efforts to preserve a truly representative form of government, is simply not relevant to the makeup of the judiciary.
>
> "The State judiciary, unlike the legislature, is not the organ responsible for achieving representative government."

347 F. Supp., at 455-56 (quoting from Buchanan v. Rhodes,

Since 1982 a few courts have held that the use of the term "representatives" in Section 2 does not necessarily exclude judges. *See Southern Christian Leadership Conference of Alabama v. Siegelman*, 714 F. Supp. 511 (M.D. Ala. 1989); *Clark v. Edwards*, 725 F. Supp. 285 (M.D. La. 1988); *Mallory v. Eyrich*, 839 F.2d 275 (6th Cir. 1988); *Martin v. Allain*, 658 F. Supp. 1183 (S.D. Miss. 1987). (All recognizing that the "one-man, one-vote" principle does not apply to judicial elections and that, unlike legislators, judges do not "represent" those who elect them, but, nevertheless, refusing to apply its established meaning to Congress' use of the term "representatives" in Section 2 of the Voting Rights Act).

[10] 347 F. Supp. 453 (M.D. La. 1972), aff'd mem., 409 U.S. 1095 (1973) (Justice White, joined by Justices Douglas and Marshall, dissenting).

249 F. Supp. 860 and *New York State Association of Trial Lawyers v. Rockefeller*, 267 F. Supp. 148). It is impossible, given the single point at issue and the simple reasoning stated, to believe that the majority of the Supreme Court, in affirming *Wells*, did not concur in that reasoning. If there were doubt, however, it would be laid to rest by the terms of the dissent, which attacks the district court opinion in stern, egalitarian terms for having, like other opinions cited by it, held "that the one-person, one-vote principle does not apply to the judiciary." 409 U.S. 1095, 1096 n.2. Nor is it likely, we think, that the Supreme Court would hold, as it necessarily did in affirming *Wells v. Edwards*, that although for purposes of the Equal Protection Clause of the Fourteenth Amendment judges "do not represent people," all the same, for purposes of Section 2(b) of the Voting Rights Act, judges are "representatives of [the people's] choice."

Both must be true, or neither one.[11]

Wells is not only instructive as to the meaning of "representatives" and thus as to the scope of Section 2, it is dispositive of the precise issue of the scope of Section 2's applicability raised in this case. The *Wells* holding -- that the one-person, one-vote rule does not apply to the judiciary -- leads inexorably to the conclusion that judicial elections cannot be attacked along lines that their processes result in unintentional dilution of the voting strength of minority members. Absent the one-person, one-vote rule -- that the vote of each individual voter must be roughly equal in

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[11] It is interestig to note that the dissent from the panel opinion, in the very course of complaining of the majority's refusal to apply Section2 to trial judges, candidadly recognizes that judges, unlike legislative and executive officers, "represent" no one:

> When weighing a state's claim that it has a compelling interest in retaining the existing at-large system, courts should keep in mind the common sense notion that the role of judges differs from that of legislative and executive officials. Since it is not the role of judges to "represent" their constituents an examination of the "responsiveness" of the elected official to minority concerns is clearly irrelevant.

902 F.2d at 317 n.17.

weight to the vote of every other individual voters, regardless of race, religion, age, sex, or even the truly subjective and uniquely individual choice of where to reside -- there is no requirement that any individual's vote weigh equally with that of anyone else. This being so, and no such right existing, we can fashion no remedy to redress the nonexistent wrong complained of here.

The notion of *individual* vote dilution, first developed by the Supreme Court in Reynolds v. Sims, 377 U.S. 533 (1964), was the foundation for the concept of *minority* vote dilution to be later elaborated in *Whitcomb v. Chavis*, 403 U.S. 124 (1971)[12], *White v. Regester*, *supra*, and *Zimmer v. McKeithen*, 485 F.2d 1297 (5th Cir. 1973). Individual vote dilution was remedied by the Court through the concept of one-person, one-vote -- the guarantee of substantial equality

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[12] In *Whitcomb v. Chavis* the Supreme Court directly considered a racial dilution challenge and rejected the claim that the Indiana legislative reapportionment plan operated to minimize or cancel out minority voting strength. The Court held that the mere fact that ghetto residents were not proportionately represented did not prove a consitutional violation unless they were denied equal access to the political process.

among individual voters. With that guarantee in mind, remedial schemes to combat minority vote dilution were devised on a case by case basis.

Almost twenty years ago, we articulated the conceptual link between individual vote dilution and minority vote dilution, making clear the latter's dependence on the former:

> Inherent in the concept of fair representation are two propositions: first, that in apportionment schemes, one man's vote should equal another man's vote as nearly as practicable; and second, that *assuming substantial equality*, the scheme must not operate to minimize or cancel out the voting strength of racial elements of the voting population.

Zimmer, 485 F.2d at 1303 (emphasis added).

For it is the assumption of substantial equality (achieved through the guarantee of one-person, one-vote) that underlies the concept of minority vote dilution. This assumption, the Court held in *Wells*, does not obtain in judicial elections; and without that assumption there exists no yardstick by which to measure either the "correct" magnitude of minority voting strength or the degree of minority vote dilution.

Thus, on a conceptual level, and to paraphrase Justice Harlan, we are asked to undertake the ineffable task of equalizing that which we cannot measure. *Whitcomb*, 403 U.S. at 169 (Harlan, J., separate opinion).

We are therefore unable to take the crucial step from individual vote dilution to minority vote dilution in this case, not only because the holding in *Wells* forbids us to *assume* the existence of "substantial equality," but because it compels us to recognize that no such equality need exist in the arena of judicial elections. The bridge between the two concepts, fashioned by the Court in *Reynolds v. Sims* and applied there to state legislatures, is of limited length and, as the Court made clear by affirming *Wells v. Edwards*, does not extend to the judiciary.

Finally, as the district court stated in *Wells*:

> The primary purpose of one-man, one-vote apportionment is to make sure that each official member of an elected body speaks for approximately the same number of constituents.

Wells, 347 F. Supp. at 455.

We reiterate that judges do not represent people and, thus, have no constituents. Judges speak the voice of the law. In doing so they speak for and to the *entire* community, never for segments of it and still less for particular individuals. To describe the judge's office merely as "not a representative one" is a gross understatement; in truth, it is rather the precise antithesis of such an office. Just insofar as a judge *does* represent anyone, he is not a judge but a partisan.

New Subsection 2(b)

So the land lay when Congress enacted Section 2(b) in 1982, choosing to replace the term "legislator" in the *White* phraseology with the term "representative" -- a term which is employed only at this spot and appears nowhere else in the entire Voting Rights Act. By the settled canon of construction, we must presume that Congress was aware of the uniform construction which had been placed by the courts on the term that it selected, a construction by which the judicial office was not deemed a "representative" one.

Goodyear Atomic Corp. v. Miller, 486 U.S. 174 (1988); *Sutton v. United States*, 819 F.2d 1289 (5th Cir. 1987). Against this background, then, the Congress deliberately picked a term of art for use in amending Section 2 that up to that time had been universally held, and which it *knew* had been universally held by every federal court that had considered it as of that date, neither to include judges nor to comprise judicial offices. In view of these circumstances, we find it all but impossible to avoid the conclusion that Congress intended to apply its newly imposed results test to elections for representative, political offices but not to vote dilution claims in judicial contests, leaving the latter to be regulated and controlled by state law, by the Constitution, or by other provisions of the Voting Rights Act.[13] Given the

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[13] Indeed, as the panel opinion correctly notes, many states of the Union over the course of their history have maintained an appointive judiciary, and some do so today. 902 F.2d, at 296. Given the fact, also noted there, that none of the original thirteen states elected its judiciary, an appointive system must be viewed as consistent with the "Republican Form of Government" guaranteed the States by Article 4, Section 4, of the Constitution.

In view of this, and while it is certainly possible to imagine

mutual exclusiveness of the two terms, to suggest that Congress chose "representatives" with the intent of including judges is roughly on a par with suggesting that the term *night* may, in a given circumstance, properly be read to include *day*.

We are further persuaded by the knowledge that in amending Section 2 Congress was well aware of the genesis of the concept of minority vote dilution. The legislative history makes clear that Congress knew that "[t]he principle that the right to vote is denied or abridged by dilution of voting strength derives from the one-person, one-vote reapportionment case of *Reynolds v. Sims*." S. Rep. No. 417, 97th Cong., 2d Sess., *reprinted in* 1982 U.S. Code Cong. & Admin. News at 196. Given its awareness of the

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Congress's taking the position that, while states need not elect judges, if they do so they must do so on exactly the same terms as they elect representatives, the view which it adopted seems at least equally cogent: that since the office of the judge is not to represent the popular will, and since judges are not expected to initiate significant departures in law or policy, the states need not be subjected in their selection or election to so severe and intrusive a provision as one applying a "results" test to claims of minority vote dilution.

Wells v. Edwards holding -- that the one-person, one vote rule does not apply to the judiciary -- we must conclude that Congress, aware of the combined effect of *Reynolds* and *Wells*, limited the scope of amended Section 2 so as to rule out the judicial branch, an area within which the issue of the viability of minority vote dilution claims had been well settled.

Countervailing Arguments

Thus we find on one side of the argument whether Section 2(b)'s results test for elections applies to judicial ones the Congress's carefully chosen term of art -- "representatives" -- deliberately selected by Congress and placed in the section itself, with a settled legal meaning excluding judges. One the other side are ranged contentions of a more attenuated and derivative nature, which we now consider briefly.

First we are told that the definition of "voting," included in the original act as Section 14(c(1) and now

codified as 42 U.S.C. 1973(1)(c)(1), refers to "candidates for public or party office" and that, since judicial hopefuls are included within the generality of such a reference to candidates, the results test which applies to all others must be applied to them as well. The specific controls the general here, however, as in any other instance of statutory construction; and we see little force in the claim that an inference from a general term buried in a definitional section far from Section 2 should control the specific and supervening language inserted by Congress in the section itself. Nor is there any necessary conflict between the two provisions: as we have noted, it is only the application of the results test portion of amended Section 2 to vote dilution claims in judicial elections that is at issue today. Other portions of the section may well apply to such elections, as may the results test to claims other than those of vote dilution, along with the indubitably applicable Constitutional prohibitions against any intentional act of discrimination in

any electoral aspect.

The same answer also refutes the next argument: that because, as was held in *Haith v. Martin*, 618 F. Supp. 410 (E.D.N.C. 1985), *aff'd mem.*, 477 U.S. 901 (1986), Section 5 of the Act applies to state judicial elections, Section 2 must apply as well. As we have explained, portions of Section 2 may well apply -- except for the results test introduced in response to the holding in *Bolden* to govern vote dilution in the election of "representatives," which by its own terms does not.

Next we are told, in yet another general argument similar to those we have just rejected, that we must apply the dilution results test to judicial elections because the 1982 amendments to Section 2 were intended to expand, rather than to restrict, the section's coverage. Doubtless they were generally so intended; doubtless they did so; but the presence of a general intent to expand coverage requires neither an expansion at all points nor the maximum imaginable

expansion at any and is not even necessarily at odds with a specific intent to restrict coverage at one or another of them. Section 2 was greatly expanded, expanded to add a results test to the intent test of the Fourteenth and Fifteenth Amendments -- expanded in most respects, but not in all.

Finally, in a scatter of birdshot contentions, counsel point to the broad construction that the Attorney General has historically accorded the Voting Rights Act, to the absence in the Act's legislative history of any explicit statement that judicial elections are *not* covered, to the presence in that history of references to statistics on minority performance in various elections (including judicial ones), and to a single reference to "judicial districts" in a cautionary parade of horribles to be found in a subcommittee report hostile to the proposed 1982 amendments. None of these seems to us to weigh very heavily in the scales against the specific

terminology of Section 2 itself.[14] In the words of Justice Frankfurter, writing for a unanimous court in *Greenwood v. United States*, it appears to us that "this is a care for applying the canon of construction of the wag who said, when the legislative history is doubtful, go to the statute." 350 U.S. 366, 374 (1955).

It is, and we do so.

Conclusion

In no area should federal courts tread more cautiously than where it is contended that Congress has imposed incremental Federal power on the States; and the nearer to

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[14] . Thus, as Justice Scalia has very recently suggested, we "appl[y] to the text of the statute the standard tools of legal reasoning, instead of scouring the legislative history for some scrap that is on point . . . ." *Begier v. United States*, ___ U.S. ____, ____; 110 L.Ed.2d 46, 63 (1990) (concurrence in judgment).

And these small matters are indeed scourings. The panel opinion avers, 902 F.2d at 299, and we do not doubt, that the reference to "judicial districts" is the sole ference to the judiciary in all the legislative history of the 1982 amendments of the Act. It will be noted that even this reference is one to judicial *districts*, not to judicial candidates; and in our Circuit many officials such as sheriffs, highway commissioners, district attorneys and clerks of court, who are "representatives" and not judges, are elected from judicial districts, *e.g.*, Miss. Code Ann. (1972) 65-1-3.

the core of traditional state authority and concern we are asked to venture, the more warily we should tread. The point is elegantly made by the panel opinion in this very case:

> Few would quarrel with the assertion that Section 2(b) as interpreted has worked a fundamental change in the Act, highly intrusive to the states. We have insisted in other contexts that Congress clearly state its intent to supplant traditional state prerogatives. Judicial insistence upon clear statement is an important interpretative tool vindicating concern for separation of powers and federalism. *See Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 105 S.Ct. 3142 (1985); *Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89, 104 S.Ct. 900 (1984) (*Pennhurst II*). This insistence upon an "unequivocal expression of congressional intent," *Pennhurst II*, 465 U.S. at 99, 104 S.Ct. at 907, is based upon the fundamental nature of the interests at stake. "The 'constitutionally mandated balance of power' between the states and the Federal Government was adopted by the Framers to ensure the protection of 'our fundamental liberties.'" *Atascadero*, 105 S.Ct. at 3147 (quoting *Garcia v. San Antonio Metropolitan Transport Authority*, 469 U.S. 528, 572, 105 S.Ct. 1005, 1028 (1985) (Powell, J., dissenting)).

LULAC, 902 F.2d at 301.

It is hard to envision any area lying closer to the core of state concerns than the process by which it selects its own officers and functionaries. Any federal trenching here strikes at federalism's jugular; and such a radical federal trenching as is contended for today should therefore demand a very clear statement indeed. Instead, as regards the issue in this case, our investigation reveals an all but total absence of relevant legislative history and a statutory text that unambiguously excludes elections of non-representative state officers from Section 2's highly intrusive results test. If this was not the intended effect of Congress's substitution of *representatives* for *legislators* in Justice White's language, no other suggests itself; and we must reject any notion that Congress went to all the trouble of selecting that language and carefully modifying it, just so far and no further, randomly and with nothing particular in mind.[16] It is never

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[16] Both the dissent and, more obliquely, the special concurrence take our writing to task as resting on the narrow foundation of one word. In main, this is true; for the substitution of the term "representative" is all but the sole clue to be found -- in either the

proper for us to extend a statute's force by construction into areas where Congress has not seen fit or has been unable to agree to go, and never less proper than in such supremely sensitive territory as this.

Judicial offices and judicial selection processes are sui generis in our nation's political system; they determine the referees in our majoritarian political game. These offices are not "representative" ones, and their occupants are not representatives. Indeed, the state processes for filling them need not even be elective, as those for all representative offices presumably must be. *See* U.S. Const., Art. 4, Sec. 4. In 1982, when Congress determined to expand Section 2 of the Act to incorporate a results test for vote dilution, it

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statutory text or the legislative history -- to guide the interpreter in unraveling the legislative intent behind this enigmatic statute. Dim or no, it is the only light available to guide our footsteps, and we have followed it as best we could.

By contrast, our specially concurring and dissenting brethren proceed by ignoring the sole guide available, first declaring that the only light that shines is of no help, then proceeding in total darkness and, so proceeding, to declare that the statute means, not what it says, but what they think Congress should said -- pausing briefly in passing to accuse our majority of doing what they in fact have done themselves.

stopped short of imposing such a test for judicial offices on the States by limiting it to their election of "representatives." Should Congress seek to install such a test for judicial elections, it must say so plainly. Instead, it has thus far plainly said the contrary. *Chisom v. Edwards*, 839 F.2d 1056 (5th Cir. 1988) is overruled.

REVERSED.

CLARK, Chief Judge, concurring specially: This brief soliloquy is necessarily said, in my respectful view, because every other opinion goes farther than the Voting Rights Act intends. My brothers Gee and Higginbotham are at odds about the way the court should take to reach the same result. While their disagreement centers on the representative nature of the judicial office, the essence of their analyses of the impact of racial vote dilution in this judicial election process based on the nature of the office is similar--so similar that, if their opinions were expressly limited to the facts of the present case, I agree with both.

There is no disagreement that Section 2 of the Voting Rights Act, before its amendment, forbade *any* practice or procedure that abridged the right to vote because of race or color. All also agree that the legislative intent of the amendment was only to broaden the test for vote dilution from "intent" to "result."

The elements of Judge Gee's analysis are that, since section 2(b) defines vote dilution in terms of representatives, no vote dilution claim can be made in any election of a judicial officer because a judge can never be a representative--a conclusion he finds confirmed by the Supreme Court's refusal in *Wells v. Edwards* to apply one-man, one-vote standards to judicial election districts.

Judge Higginbotham rejects this analysis. He would base reversal on the premise that none of several elected trial judges who all function singularly in their work can be subject to the single-member redistricting claim made here. My concern is that the court's opinion, as now written, puts vote dilution attacks on (1) judicial elections which cannot be resolved by examining the nature of the office, and (2) "issue" elections (such as referenda on constitutional amendments and bond issue elections) beyond the reach of amended section 2.

Judge Gee starts with the observation that the words of

section 2 expressly limit vote dilution to elections of representatives. I can readily agree section 2 does not apply to the elections challenged here. It involves only the election of persons and voter impact turns entirely on the nature of the judicial office. This brings section 2(b) into play. The inherent nature of the judicial function and, indeed, the constitutional limits of due process require that every judge be impartial between litigants and neutral as to claims presented. In the discharge of official duties, no judge can ever "represent" the electors in the jurisdiction served by the court. A vote for a judge differs from a vote for other types of officers. Whether the choice be for councilman, sheriff or governor, and whether it be based on whim or party or nonpartisan analysis of the individual candidate, votes for these types of officials are cast for those who will best express the wishes and views of their constituents. This cannot be so when a voter picks a judge. Legislators and executives are expected to represent. Voters must know

judges cannot. The same principles control when a state provides for election rather than appointment of its judiciary. The choice seeks to assure the public that the judicial function will be kept accountable to the common sense of the electorate. It is expected that candidates who lack training or a reputation for honesty or sound intellect will not be elected. In like manner, those who are indolent, will not decide cases or decide erratically will not be reelected. Overarching any considerations of voter motivation is the due process neutrality required in the conduct of the office. It does not permit the judge's responsiveness to the electorate's concept of common sense to become representation of the electorate. The State of Texas has a strong interest, and, indeed, a fundamental right to choose to have these judges elected in the manner provided here. Its choice does not violate amended section 2.

The difficulty I have with Judge Gee's analysis is that it has no limit. There are many types of elections which

involve issues, not candidates, which surely ought to be subject to the vote dilution stricture of section 2 despite the absence of any question of representation. But merely noting the applicability to "issue" elections would not adequately define the reach of section 2. It is imperative, in my view, that a bright circle be drawn around judicial elections as well. Judge Gee's reasoning would expressly deny section 2(a) coverage to judicial elections in situations beyond today's facts, as he makes clear by overruling *Chisom v. Edwards*. Section 2(a) is an integral part of a remedial statute. It deserves to be interpreted so as to prevent racial vote abridgment even when it occurs in a judicial election. The phrase "as provided in subsection (b) of this section" which appears at the end of subsection (a) should be read as giving an example of proscribed vote dilution. It does not provide that section 2(b) establishes the *only* way the section can be violated.

It is clear to me that when a state continues to apply a

voting procedure in a manner which now results in an abridgement of the right of a citizen to vote on account of race, that procedure is still condemned by amended section 2(a), just as it was before the amendment.

Nothing we say today should be taken as passing on a claim that a judicial election process in which judges are elected by fewer than all of the eligible voters within the jurisdictional area of the court c.. which the judge will serve has become a violation of section 2. Such elections involve districting of voters in a manner entirely unrelated to the representative nature of the judge's office.

Gingles tells me that whether the political process chosen by Texas for selecting its judges is equally open depends upon evaluation of past and present reality under a functional view of the process. There is nothing wrong with the state's choice to elect any number of a county's district judges county-wide. However, if the state has chosen to divide a single judicial jurisdiction into separate groups of

electors, that choice could, with changes in demographics or other conditions come to raise real issues of racial gerrymander, gross diminution of voting strength, candidate slating ability or other violations of equal protection which have nothing to do with the due process concerns which control the execution of judicial duties, or with the manner in which the office of judge is carried out. Of course, I agree that Wells v. Edwards establishes that approximate numeric equality of voters between judicial districts is not required. However, we need not and should not decide now that judicial subdistricts which grow to have gross numeric or racial disparities in their make-up will always be free of possible section 2 problems. For this reason, I respectfully, but expressly, disagree with the majority's flat-out overruling of *Chisom v. Edwards*.

We are not confronted here with any claim of vote dilution resulting from long-established subdistricts alleged to have become racially invidious on a basis of intra-

jurisdictional voter distribution. This was the claim that was before this court in *Chisom*. The *holding* in *Chisom* reversed a dismissal on the pleadings. I agree that such a reversal was proper, even though I cannot agree with all said in Part I of Judge Higginbotham's concurrence or Judge Johnson's dissent because both deny vitality to section 2(b). Since we are writing en banc, I am free to disagree with the *reason* given for the result in *Chisom*--that section 2 applies to all judicial elections. I am of the opinion that it is equally wrong to say that section 2 covers *all* judicial elections as it is to say it covers *none*. However, if today's facts were the same as *Chisom*'s, I would hold a claim that judicial subdistricts, once having no invidious purpose, but alleged, over time, to have come to abridge section 2 rights, must be factually developed and cannot be dismissed on pleadings alone.

If the issue were reached in today's case, I would also agree with Judge Higginbotham that the presence of multiple

judicial posts on the ballots of plaintiffs here gives them no section 2 right to have single-judge subdistricts drawn. I would do so because I am not required to agree that the principle applies on any broader scale then the facts before us present. His function-of-the-office analysis is, to me, identical in concept to the majority view. The caveat I think must be added to both is that only when the area of jurisdiction of each of several jurist to be elected is coextensive with the area of residence of those that elect them, is each vote for a judge bound to be equal to every other vote that may be cast.

I would not agree with Judge Higginbotham that the single-judge, trial-court function of the judicial office is a critical factor. The analysis ought to be the same regardless of how the judge judges. When an appellate judge--who must function with other appellate judges to accomplish the judicial task-serves the same jurisdictional area as that which defines the electorate, section 2 does not allow a single

member subdistricting remedy to be applied. This is so because no intradistrict or intrastate violation of section 2 is possible. The collegial nature of the appellate office in no way alters the compulsion for due process neutrality. When this neutrality is coupled with congruence of jurisdiction and electorate, they jointly assure equality in voting practices and procedures, negate representation and eliminate the possibility of vote dilution.

However, as with my partial agreement with Judge Gee's analysis, agreement with Judge Higginbotham should not be taken as controlling fact situations not before us here. The single-judge, trial-court functional analysis proceeds solely on what the judge does and the way he does it. These analyses change no basic principles. If the coincidence of voter residence and jurisdiction does not exist, the same possible vote dilution violations mentioned above, which have nothing to do with the function of the office being voted on, could occur. The importance of the policy

embodied in section 2 compels me to say that these limits must be placed on what we write so that future courts will not cut short the intended reach of section 2. In my view, the majority view should be limited to the facts before us.

With the reservations expressed, I respectfully concur in reversing the judgment appealed from.

HIGGINBOTHAM, Circuit Judge, with whom, POLITZ, KING and DAVIS, join, concurring in the judgment.* JOHNSON, Circuit Judge, concurs in Part 1. WIENER, Circuit Judge, concurs in Part 2.

This is a voting rights suit challenging the election of district judges on a county-wide basis in Texas. The suit was filed in a United States District Court by the League of United Latin American Citizens against the Attorney General of Texas, the Secretary of State, and other state officials, seeking a declaratory judgment that the at-large election of state district judges in nine targeted counties is illegal under Section 2 of the Voting Rights Act, 42 U.S.C. § 1973, and violative of the fourteenth and fifteenth amendments of the

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*When this case was orally argued before and considered by the court, Judge Reavley was in active service. He participated in both the oral argument and the en banc conference. He took senior status, however, on August 1, 1990. Based on his understanding of the Supreme Court decision in *United States v. American-Foreign Steamsip Corp.*, 363 U.S. 685, 80 S.Ct. 1336, 4 L.Ed.2d 1490 (1960), he considers himself ineligible to participate in the decision of this case, but he adheres to the views in this opinion. See *Sawyer v. Butler*, 881 F.2d 1273 (5th cir. 1989) and Court Policy 21.C.

United States Constitution. Plaintiffs requested the district court to enjoin further elections and to impose a districting scheme that included single-member districts. Texas has 254 counties, but the suit attacked only Harris, Dallas, Tarrant, Bexar, Travis, Jefferson, Lubbock, Ector, and Midland Counties[2] These nine counties have more than one district judge elected county-wide, and elected 172 of the state's 390 district judges. As we will explain, the suit targets Texas law requiring election of a state district judge from a district no smaller than the county, the geographical area of its jurisdiction.

After a bench trial, the district court found violations of the Voting Rights Act in each of the nine counties, but rejected the constitutional arguments, finding that plaintiffs had failed to prove that the electoral system was instituted or maintained with discriminatory intent. On January 2, 1990,

[2] Ten counties actually are targeted. The challenged 72nd Judicial District encompasses two counties, Lubbock and Crosby. We will refer to the nine targeted Judicial Districts as nine counties.

the district court enjoined defendants from:

> Calling, holding, supervising and certifying elections for state district judges in Harris, Dallas, Tarrant, Bexar, Travis, Jefferson, Lubbock, Hector and Midland Counties under the current at-large system with an order for interim relief.

The district court divided the nine counties into electoral subdistricts, tracing the districts of state representatives and the precinct lines of County Commissioners or Justices of the Peace. The district court's order affected 115 of the 172 district courts. The district court also ordered a non-partisan election for May 5, 1990, with any run-off to be held on June 2, 1990. We stayed the district court's order pending this appeal.

Defendants first argue that the Voting Rights Act as amended in 1982 has no application to the election of judges. This argument rests on the assertion that the use by Congress of the word "representatives" in Section 2(b), added by amendment in 1982 and popularly known as the Dole compromise, unambiguously excluded elected judges because

elected judges are not representatives. This argument in its broadest form--Section 2 of the Act has no application to any judicial elections--was rejected by this court in *Chisom v. Edwards*, 839 F.2d 1056 (5th Cir.), *cert. denied sub nom. Roemer v. Chisom*, 109 S.Ct. 390 (1988). The panel opinion was unanimous. The petition for rehearing en banc was denied without a single member of the court requesting a poll. Relatedly, but with less sweep, defendants argue that Section 2(b) has no application to state district judges because such judges do their judging singly and not as part of a collegial body. Finally, defendants attack the findings below as well as the ordered remedy. In addition to quarrels with the sufficiency of proof that the votes of minorities were diluted, defendants argue that the findings are flawed by the erroneous legal conclusion that the contribution of partisan voting to election outcomes is not relevant.

We are unpersuaded that *Chisom*'s decision regarding the election of appellate judges was incorrect, but are

persuaded that Section 2(b) will not support this attack upon the countywide election of trial judges. Because we would decide the case on this ground we do not reach defendants' other contentions.

I.

A.

We are pointed to no evidence of how the Framers' viewed elected judges. This is not surprising; judges were not elected at the time the Constitution was written and ratified. The thirteen original states employed various methods of judicial selection, seven using appointment by the legislature, five by governor and council, and one by governor and legislature. See Winters, *Selection of Judges--an Historical Introduction,* 44 Tex. L. Rev. 1081, 1082 (1966). Electing judges was a Jacksonian reform aimed at making judicial selection more democratic:

> Popular sovereignty and popular control of public affairs through the elective system were hallmarks of the Jacksonian era, and, not surprisingly, the movement for popular election of judges dates from this period.

> Dissatisfaction with the judiciary was widespread among Jacksonians. It arose from several factors including a general disaffection with the legal profession, abuses in the judicial appointment systems, and a feeling, carried over from the Jeffersonian period, that the courts were basically undemocratic. Consequently, the abolition of tenure during good behavior and the adoption of the elective system were advocated as reform measures and were hailed as in accord with the egalitarian spirit of the times.

Note, *The Equal Population Principle: Does It Apply to Elected Judges?*, 47 Notre Dame L. Rev. 316, 317 (1971).

The first judicial elections took place as early as 1812 for Georgia lower court judges, Ga. Const. art. III, § 4 (1812), and in 1832 Mississippi adopted a completely elective judiciary. Miss. Const. art. IV, §§ 2, 11, 16 (1832). When it joined the Union, Texas ironically became the first new state to adopt the federal method of selecting judges, by executive appointment with confirmation by the state senate. Id.; Tex. Const. art. IV., Section 5 (1845). The wholesale change from appointed to elected judges can be marked by New York's adoption of judicial elections in 1846. N.Y. Const. art. VI, §§ 2, 4, 12, 14 (1846). All

new states entering the union after that date, until the entrance of Alaska in 1958, used elections as their method of judicial selection, and Georgia, Maryland, Virginia, and Pennsylvania switched from appointment to election. Winters, *Selection of Judges*, 44 Tex. L. Rev. at 1082. In short, it is fair to conclude that electing judges was viewed as being more democratic and as a way of ensuring that judges remained sensitive to the concerns of the people.

It is vigorously argued that Section 2 of the Voting Rights Act has no application to judicial elections because judges are not representatives. The argument in its strongest form is that the word "representatives," found in Section 2(b), unambiguously excludes judges because judges have no constituents. The argument continues that there is no occasion for exploring legislative history because the inquiry ends with the plain words of the statute. While drawing the language of Section 2(b) from *White v. Regester*, 412 U.S. 755 (1973) Congress substituted the word "representatives"

for "legislators," at the least to insure it reached elected executive officials. This much defendants do not deny. Rather, they argue that although "representatives" may encompass executive officials, Congress intended that the term not encompass judges.

To be unambiguously inapplicable to judges, the word "representatives" must be certain of only one relevant meaning and that meaning must exclude judges. Defendants must concede, however, that at one level of generality judges are representatives. The history of electing judges and the political impulses behind that choice are powerful evidence of considered decisions to keep judges sensitive to the concerns of the people and responsive to their changing will. This reality belies the bold assertion that judges are in no sense representatives. The assertion that judges are not representatives actually masks a concern that judges should not be representatives. This is a choice left to the states, and Texas has chosen to elect judges convinced that direct

accountability insures that judges represent the people in their judicial tasks.

Judges are oath bound to obey the law and to make decisions in an impartial manner but that does not mean that they are in no practical sense representatives of the people. Yet, executive officials, who are considered representatives, are bound by the same oath. While judges are indeed far removed from the logrolling give and take of the legislative and even executive processes, the effort to assure "sensitivity" and "accountability" through elections is no more than an insistence that the judges represent the people in their task of deciding cases and expounding the law. State judges, wearing their common law hats, face decisions such as whether to adopt a comparative fault standard, and in doing so represent the people in a very real sense. At least at this level of generality judges are indisputably representatives of voters. Saying so in no way steps on the equally indisputable difference between judges and other

representatives--that judges do not represent a specific constituency.

It is true that judges do not carry the views of a certain group of people into a larger governmental body, attempting to sway that body toward decisions favorable to their constituency.[3] That is not the necessary role of a representative. We extol the virtues of the jury in criminal cases--the jury is said to be the *representatives* of the people. Both judicial opinions and academic writings describe members of juries as representatives. See *Spaziano v. Florida*, 104 S.Ct. 3154, 3176 (1984); *Gillers, Deciding Who Dies*, 129 U. Pa. L. Rev. 1, 63-65 (1980); H. Kalven & H. Zeisel, *The American Jury* 436 (1966). The examples can be multiplied, but the point is plain. The conclusion that the word "representative" has the singular meaning of legislator is nothing more than an effort to substitute judicial will for that of Congress. It is an undisguised effort by

[3] The same may be said for county surveyors, treasurers, court clerks and a myriad of office holders.

judges to claim for judges an exemption from the Voting Rights Act. This exercise of raw judicial power claims for federal courts, power belonging to Congress and to the states. Texas has decided to elect its judges and Congress has decided to protect the rights of voters in those elections.[4]

In sum, we cannot determine whether Section 2(b) of the Voting Rights Act applies to judicial elections by looking only to the word "representative." Rather, we must look to the context in which the word is used and legislative history, cautious as we must be over that enterprise. Exploration of this context requires that we determine whether in using the word representative in the 1982 amendments, Congress intended to withdraw the Act's existing coverage of judicial elections. That is, the freight the majority's use of representative must bear becomes enormous if, before the

[4] It is argued that, whether or not the unamended Section 2 reached judicial elections is irrelevant, because Section 2(b) represents not just an amendment to but a fundamental shift in the operation of the Act. As such, the amended Section 2 should not be read to reach judicial elections unless Congress explicitly so provided. *See Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 105 S.Ct. 3142 (1985). We refute this argument in the text below.

1982 amendments, the Voting Rights Act reached judicial elections.[5]

We therefore turn first to whether the Voting Rights Act covered judicial elections before 1982. We consider the 1982 amendments to the Act and review the legislative history of the amendments. We then turn to the question whether Congress was required to mention specifically the election of judges in the statute. The resolution of this question is informed by application of settled principles of federalism; we determine that the election of judges has no claim to the protections of federalism not shared by other institutions of state government. We next reject the argument that because the one-person, one-vote principle is inapplicable to the judiciary, racial vote-dilution claims under Section 2 must be inapplicable as well. Finally, we look at

[5] It is argued that, whether or not the unamended Section 2 reached judicial elections is irrelevant, because Section 2(b) represents not just an amendment to but a fundamental shift in the operation of the Act. As such, the amdned Section 2 should not be read to reach judicial elections unless Congress explicitly so provided. See *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 105 S.Ct. 3142 (1985). We refute this argument in the text below.

the interplay of Sections 2 and 5 to determine whether differences between the two sections preclude the application of Section 2 to judicial elections despite Section 5's coverage of those same elections, and conclude that they do not.

B.

Section 2, before the 1982 amendments, provided as follows:

> § 1973. Denial or abridgement of right to vote on account of race or color through voting qualifications or prerequisites.
>
> No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title.

42 U.S.C. § 1973 (1975).

Section 2 by its express terms reached state judicial elections. "Vote" or "voting" was defined as including "all action necessary to make a vote effective in any primary, special or general election . . . with respect to candidates for public or party office and propositions for which votes

are received in an election." 42 U.S.C. § 1973*l*(c)(1). There was no mention of judges or the judiciary. There also was no mention of any other specific office. Judges are "candidates for public or party office" elected in a "primary, special, or general election." Congress intended to reach all types of elections, rather than to pick and choose. Indeed, even votes on propositions are within the purview of the Act. Section 14(c)(1), 42 U.S.C. § 1973*l*(c)(1).

Defendants argue that the Act is silent as to judges, so it must be construed as not including judicial elections. They argue that, while judges in Texas are "candidates for public office," it is uncertain whether Congress, by providing a broad definition of "vote," also intended to create a private remedial cause of action of similar scope in Section 2. Congress expressly defined the term "vote" or "voting," however, and nothing suggests that Congress did not intend that definition to apply throughout the Act, including Section 2.

Congress intended that its 1965 Act provide protection coextensive with the Constitution. Justice Stewart reiterated this in *Mobile v. Bolden*:

> [I]t is apparent that the language of section 2 no more than elaborates upon that of the Fifteenth Amendment, and the sparse legislative history of section 2 makes clear that it was intended to have an effect no different from that of the Fifteenth Amendment itself . . . .

446 U.S. 55, 60-61 (1980). We reject the implicit suggestion that the protections of the Fifteenth Amendment do not extend to minorities whose right to vote in judicial elections is abridged. The Fifteenth Amendment applies to all elections, and Congress intended the Voting Rights Act of 1965 to apply to all elections.

By its terms the 1965 Act included judicial elections. Under defendants' argument then the word representative in Section 2(b) must bear the burden of being the sole means by which Congress in the 1982 amendments exempted judicial elections from the Act's coverage. The record is barren of any hint that Congress's effort in 1982 to expand

the Voting Rights Act carried a sub rosa withdrawal of coverage for state judicial elections.

C.

Congress amended Section 2 in 1982 in partial response to the Supreme Court's decision in *City of Mobile v. Bolden*, 446 U.S. 55 (1980). *Thornburgh v. Gingles*, 478 U.S. 30, 106 S.Ct. 2752, 2758 (1986). Bolden held that in order to establish a violation under Section 2 of the Act a plaintiff must prove purposeful racial discrimination. Bolden, 446 U.S. at 66. Congress incorporated a "results test" into Section 2(a) to diminish the burden of proof necessary to prove a violation. Congress also added Section 2(b), which codified the legal standards enunciated in *White v. Regester*, 412 U.S. 755 (1973).[5]

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[5] In *White v. Regester* the Supreme Court interpreted the requirements of the Voting Rights Act and the U.S. Constitution with respect to claims of vote dilution:

> The plaintiffs' burden is to produce evidence to support findings that the political processes leading to nomination and election were not equally open to participation by the group in question--that its members had less opportunity than did other residents in the district to participate in the political processes and to elect legislators of their choice.

As amended in 1982, Section 2 now provides:

> (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, as provided in subsection (b) of this section.
>
> (b) A violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided*, that nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

42 U.S.C. § 1973 (1982).

The plain language of Section 2(a) reaches judicial elections, using the same broad language as the 1965 Act,

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412 U.S. at 766.

referring generally to "voting" and "vote," the definitions of which continued unchanged under the 1982 amendments. The legislative history of the 1982 amendments does not indicate that the terms "vote" or "voting" do not include judicial elections, or that "candidates for public office" does not include judges. While retaining the identical statutory reach, Congress added the word "results" as the measure of violation. The word representative does not appear in subsection (a).

Section 2(b) is a new section added in the 1982 amendments. Section 2(a) refers to "denial or abridgement of the right . . . to vote on account of race or color . . ., as provided in subsection (b) of this section." Section 2(a) anticipates that subsection (b) will define how a violation of subsection (a) can be established. Other than the previously discussed vague use of the word "representative," there is no reason to suppose that subsection (b), defining a type of proof sufficient under Section 2, was meant to withdraw all

coverage from judicial elections. Before we turn to the legislative history of the 1982 amendments for evidence of intent to exclude judicial elections from coverage, we pause to emphasize that the exercise is itself not necessary. A straightforward reading of both Section 2(a) and 2(b) leaves little doubt but that 2(a)'s broad reach was never intended to be limited by use of the word representative in the explanation in Section 2(b) of how a violation might be shown.

Congress used the word "candidates" interchangeably with "representatives" in the legislative history. There was no indication that "representatives" was intended to have a limited meaning, applying only to legislative and executive officials, but not to elected members of the judiciary. Even Senator Dole, who proposed the language of compromise in Section 2, stated:

> Citizens of all races are entitled to have an equal chance of electing *candidates* of their choice, but if they are fairly afforded that opportunity, and lose, the law should offer no redress.

S. Rep. No. 417, 97th Cong., 2d Sess. 193 (Additional Views of Senator Robert Dole), *reprinted in* 1982 U.S. Code Cong. & Admin. News 177, 364 (emphasis added), and

> [T]he standard is whether the political processes are equally "open" in that members of a protected class have the same *opportunity* as others to participate in the political process and to elect *candidates* of their choice.

Id. (emphasis added).

In the one place where the judiciary is specifically mentioned in the legislative history of the 1982 amendments, the report of the subcommittee on the Constitution states that the term "'political subdivision' encompasses *all* governmental units, including city and county councils, school boards, *judicial districts*, utility districts, as well as state legislatures." Report of the Subcommittee on the Constitution of the Committee of the Judiciary, S. Rep. 417, 97th Cong., 2d Sess., *reprinted in* 1982 U.S. Code Cong. & Admin. News 177, 323 (emphasis added). Of course, a brief statement in a subcommittee report opposing the amendments is not much. Nonetheless, the proponents of

the changes to the Act did not contest this description, although they would have had incentive to do so to alleviate any fears of such extended coverage if such a broad scope of applicability were not intended.

The Senate and House hearings regarding the 1982 amendments contain various references to judicial elections, primarily in the context of statistics presented to Congress indicating the progress made by minorities under the Act up to that date. The charts indicated when minorities were elected to office, and included judicial election results. See Extension of the Voting Rights Act: Hearings on H.R. 1407, H.R. 1731, H.R. 3112, H.R. 3198, H.R. 3473 and H.R. 3498 Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary, 97th Cong. 1st Sess. 38, 193, 239, 280, 502, 574, 804, 937, 1182, 1188, 1515, 1528, 1535, 1745, 1839, 2647 (1981); Voting Rights Act: Hearings on S. 53, S. 1761, S. 1975, S. 1992, and H.R. 3112 Before the Subcomm. on the Constitution of the

Senate Comm. on the Judiciary, 97th Cong. 2d Sess. 669, 748, 788-89 (1982).

To summarize, the relevant legislative history concerning the 1982 amendments suggests that Section 2(b) was intended to reach all elections, including judicial elections. There is no hint that Congress intended to withdraw coverage.

But, it is argued, even if other aspects of Voting Rights law do apply to judicial elections, nonetheless, vote-dilution claims should not, because these claims are a new and fundamentally different ground for relief under amended Section 2 and because anti-dilution remedies are particularly intrusive on the judiciary. Therefore, the argument continues, had Congress intended the Act to apply to judicial elections, it should have said so explicitly, which it did not. We reject this argument that Congress singled out both judicial elections and dilution claims for distinct treatment. In plain language it argues that Congress affirmatively turned

its head away from the dilution of minority votes in judicial elections.

The first flaw in this argument is that vote-dilution claims were not newly authorized by amended Section 2. There were many vote dilution cases before 1982. The statutory prohibition of vote dilution by the Voting Rights Act is as old as the Act itself. It was first raised as early as 1965, the year of the Act's inception, when the Supreme Court observed

> It might well be that, designedly or otherwise, a multi-member constituency apportionment scheme, under the circumstances of a particular case, would operate to minimize or cancel out the voting strength of racial or political elements of the voting population. When this is demonstrated it will be time enough to consider whether the system still passes constitutional muster.

Fortson v. Dorsey, 379 U.S. 433, 439 (1965). Vote-dilution claims were considered in *Burns v. Richardson*, 384 U.S. 73 (1966), and *Whitcomb v. Chavis*, 403 U.S. 124 (1972), where the plaintiffs were unsuccessful, and in *White v. Regester*, 412 U.S. 755 (1973), and *Zimmer v.*

McKeithen, 485 F.2d 1297 (5th Cir. 1973)(en banc), aff'd sub nom. East Carroll. *Parish School Board v. Marshall*, 424 U.S. 636 (1976), where the plaintiffs prevailed. These cases were decided under the results test. Finally *Mobile v. Bolden*, 446 U.S. 55 (1980), where the Supreme Court articulated the intent standard, was a dilution case. The 1965 Act, therefore, was considered to prohibit vote dilution as well as more straightforward denials of the right to vote. By its terms the act covered judicial elections. The 1982 amendments simply made it clear that results and not intent were the basis for finding a violation. However difficult in application the results test may have proved to be, the amendments to Section 2 did not themselves create a vote-dilution claim. To the contrary, the dilution of the voting strength of minorities was the accepted premise of the debate. Indeed *Zimmer v. McKeithen*, 485 F.2d 1297 (5th Cir. 1973) (en banc), the source of the "senate factors" that became part of the congressionally required inquiry, was a

dilution case.

Much of the legislative history of the 1982 amendments indicates that Congress intended to return to pre-Bolden standards, and was not otherwise reaching for a new and more intrusive private cause of action. As we will explain, at least Senator Hatch feared the language of the 1982 amendment would be much more intrusive, expressing concern that its uncertainty would lead to proportional representation. His fear was fueled by the restoration of the results test, however, not dilution theory, which had been part of the voting rights law for at least seventeen years.

The principal focus of the House debates centered on Section 5, but the Senate debates were centered on the meaning of the Section 2 amendments. Nonetheless, there was some discussion in the House, and at least some witnesses argued that "the amended Section 2 . . . would restore to black Southerners the right to challenge alleged discriminatory election schemes which were developing

before Mobile, [and that] notwithstanding the Court's claim to the contrary in Mobile, the intent test first became a constitutional standard in 1976 with Washington v. Davis, an employment case." Boyd & Markman, The 1982 Amendments to the Voting Rights Act: A Legislative History, 40 Wash. & Lee L. Rev. 1347, 1366 (citing comments by James Blacksher and David Walbert). Congressman Sensenbrenner argued that the Rodino amendment to Section 2 was necessary in order to *clarify* the standard of proof required in order to establish violations of the Act. 127 Cong. Rec. H6850 (daily ed. Oct, 1981) at H6983.

In the Senate Report on the Amendments the purpose of the bill was stated as

> designed to make clear that proof of discriminatory intent is not required to establish a violation of Section 2. It thereby *restores the legal standards* based upon the controlling Supreme Court precedents, which applied in voting discrimination claims prior to the litigation involved in Mobile v. Bolden. The amendment also adds a new subsection to Section 2 which delineates the legal standards under the results test *by codifying the leading pre-Bolden vote dilution case, White v. Regester.*

S. Rep. 417, 97th Cong., 2d Sess., reprinted in 1982 U.S. Code Cong. & Admin. News at 179 (emphasis added).

Senator Hatch opposed the change, arguing that it "would redefine the concept of 'discrimination' and would 'transform the Fifteenth Amendment and the Voting Rights Act from provisions designed to ensure equal access and equal opportunity in the electoral process to those designed to ensure equal outcome and equal success.'" Boyd, Voting Rights Act Amendments, 40 Wash. & Lee L. Rev. at 1389 (quoting Hearings on the Voting Rights Act Before the Senate Subcommittee on the Constitution of the Committee on the Judiciary, 97th Cong., 2d Sess. 3 (1982)). But, Senator Mathias, a proponent of the bill, argued

> The House amendment is needed to clarify the burden of proof in voting discrimination cases and to remove the uncertainty caused by the failure of the Supreme Court to articulate a clear standard in the City of Mobile v. Bolden. . . . We are not trying to overrule the Court. The Court seems to be in some error about what the legislative intent was . . . . Prior to Bolden , a violation in voting discrimination cases [could] be shown

> by reference to a variety of factors that, when taken together, added up to a finding of illegal discrimination. But in Bolden, the plurality appears to have abandoned this totality of circumstances approach and to have replaced it with a requirement of specific evidence of intent . . . this is a requirement of a smoking gun, and I think it becomes a crippling blow to the overall effectiveness of the Act.

Hearings on the Voting Rights Act Before the Senate Subcommittee on the Constitution of the Committee on the Judiciary, 97th Cong., 2d Sess. 3, 199 (1982).

Senator Hatch persisted that the results test represented a new test, but supporters of the bill took issue with this view. Laughlin McDonald of the ACLU argued that "[p]rior to Mobile, it was understood by lawyers trying these cases and by the judges who were hearing them that a violation of voting rights could be made out upon proof of a bad purpose or effect . . . Mobile had a dramatic effect on our cases." Id. at 369. Defenders of the amendment assumed that the results test represented a restatement of the law prior to Bolden.

Critics of the results test argued that even if the lower

federal courts had adopted a results test in their pre-Bolden interpretation of Section 2, the original intent of Congress had been the establishment of a test in Section 2 using the traditional standard of intent or purpose. Boyd, Voting Rights Act Amendments, 40 Wash. & Lee L. Rev. at 1405 (citing Appendix to Additional Views by Senator Hatch, S. Rep. NO. 417, 97th Cong., 2d Sess. 36 (1982)). Proponents responded by arguing that there was no evidence that Congress meant an intent test to apply. The Senate Report of the Committee on the Judiciary adopted this view, citing Attorney General Katzenbach's testimony during the hearings on the Voting Rights Act of 1965 to the effect that "Section 2 would ban 'any kind of practice . . . if its *purpose or effect* was to deny or abridge the right to vote on account of race or color." S. Rep. 417, 97th Cong., 2d Sess., reprinted in 1982 U.S. Code Cong. & Admin. News at 194 (citing Hearings on S. 1564 before the Committee on the Judiciary, 89th Cong., 1st Sess., 191 (1965)).

This legislative history generally indicates an intent to retain pre-Bolden standards rather than create a more intrusive new cause of action.[6] We have insisted in other contexts that Congress clearly state its intent to supplant traditional state prerogatives. Judicial insistence upon clear statement is an important interpretative tool vindicating concern for separation of powers and federalism. See *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 105 S.Ct. 3142 (1985); *Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89, 104 S.Ct. 900 (1984) (Pennhurst II). This insistence upon "an unequivocal expression of congressional intent," Pennhurst II, 465 U.S. at 99, 104 S.Ct. at 907, is based upon the fundamental nature of the interests at stake, Atascadero, 105 S.Ct. at 3147 ("The 'constitutionally mandated balance of power' between the

[6] Of course, when the 1982 amendments are considered in light of the Supreme Court's interpretation in Gingles, we cannot conclude that the 1982 amendments to Section 2 worked no changes from the pre-Bolden interpretation of the Act. But this is what it became, not necessarily what it was when voted upon.

states and the Federal Government was adopted by the Framers to ensure the protection of 'our fundamental liberties.'") (quoting *Garcia v. San Antonio Metropolitan Transport Authority*, 469 U.S. 528, 572, 105 S.Ct. 1005, 1028 (Powell, J., dissenting)). These mighty principles do not carry us very far here. Congress *has* clearly expressed the Act's application to the states, and *has* clearly expressed its intent that violations of the Act be determined by a results test rather than an intent standard. By these actions, the Act, with all of its intrusive effect, has been made to apply to the states. Significantly, the "results tests" did apply to all elections including judicial elections until the 1980 decision of Mobile v. Bolden, supra. Thus, intrusive as it is, the Act, including the anti-dilution provisions, applied to judges before the 1982 amendment. The suggestion that anti-dilution and results tests were introduced by the 1982 amendments is wrong.

The majority's argument is by necessity a demand for

the exemption of judicial elections from the Act as a whole. We cannot recognize this broad exemption.[7] Section 5, commonly seen as the most far reaching of the Voting Act provisions, see *South Carolina v. Katzenbach*, 383 U.S. 301, 358-62 (1966) (Black, J., dissenting), has allowed no escape for elected state judiciaries. *Haith v. Martin*, 618 F. Supp. 410 (E.D.N.C. 1985), aff'd mem., 477 U.S. 901, 106 S.Ct.

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[7] Congress dispensed with proof of purposeful violation for *any* voting qualifications or prerequisites to voting or standard, practice or procedure "which *results* in a denial or abridgement. . . ." It did so by using the word results in *both* 2(a) and 2(b). The word representative, so critical to defendants' argument, does not appear in the broad prohibition of Section 2(a). The Senate Report explained that the results test apply to a variety of violations.

> For example, a violation could be proved by showing that the election officials made absentee ballots available to white citizens without a corresponding opportunity being given to minority citizens. See *Brown v. Post*, 279 F. Supp. 60, 63-64 (W.D. La. 1968). Likewise, purging of voters could produce a discriminatory result if fair procedures were not followed. Toney v. White, 488 F.2d 310 (5th Cir. 1973), or if the need for a purge were not shown or if opporunities for re-registration were unduly limited. Administration of an election could likewise have a discriminatory result if, for example, the information provided to voters substantially misled them in a discriminatory way. *United States v. Post*, 297 F. Supp. 46, 50-51 (W.D. La. 1969), 412 U.S. at 769-770.

S. Rep. 97-417 n. 119 p. 208.

We decline to say that Congress intended to exempt state judicial elections from statutory regulation of these practices.

3268 (1986). As an inferior court we are bound by the holding of the Supreme Court that judicial elections are covered by Section 5 of the Act, a result explicitly urged by then Solicitor General Charles Fried and by then head of the Civil Rights Division, Assistant Attorney General William Bradford Reynolds. The same officials argued in Chisom that amended Section 2 of the Act is equally applicable, as does the present administration.

D.

Finally, it is argued that an elected state judiciary is somehow free of the anti-dilution prohibitions of the Voting Rights Act but remains subject to its other strictures. The argument has two premises: First, because the pre-Bolden anti-dilution cases did not involve judicial elections, Section 2's prohibition against vote dilution does not extend to judicial elections; second, because the one-person, one-vote principle has been held not to apply to judicial elections, vote-dilution claims under Section 2 do not apply either.

The first premise is obviously flawed. Nothing in the pre-Bolden cases suggests that the prohibition against vote dilution does not apply to judicial elections. That those cases involved elections of officials other than judges was happenstance; cases involving judicial elections simply had not yet come up. Furthermore, the statutory language cannot be parsed to read that judicial elections are not subject to dilution claims, but *are* subject to the remaining strictures of Section 2. This is so even if representative is found to mean elected members of the legislative and executive branches but not the judicial branches of state government. Further, concluding that Section 2 does not apply would create the anomaly that Section 5, conceded to reach elected judges, and Section 2 use identical language to define their reach. Section 2 either applies in its entirety or not at all and defendants' efforts to soften the full force of their extraordinary contention must fail.

The second premise--that because the one-person, one

vote principle does not apply to judicial elections, the vote-dilution prohibition does not either--must also fail. The prohibition of geographical discrimination in voting expressed in *Baker v. Carr*, 369 U.S. 186 (1962) and *Reynolds v. Sims*, 377 U.S. 533 (1964), commonly referred to as the one-person, one-vote principle, was held not to apply to the apportionment of state judiciaries in *Wells v. Edwards*, 347 F. Supp. 453 (N.D. La. 1972) (3-judge court), aff'd mem., 409 U.S. 1095 (1973) (three justices, dissenting). It is argued that vote dilution principles cannot be applied to an elected judiciary because the one-man, one-vote principle does not apply, and without requiring equal apportionment there is no benchmark for concluding that there is vote dilution. This argument rests upon the equating of racial and non-racial acts by the state that deny voting strength. Yet they measure equality on quite different planes. One is facially neutral in the matter of race; indeed compliance may adversely affect black voting power. The

other rests on core concerns of the Civil War amendments--submerging of minority voting strength by the combined force of election methods and bigotry. In the more concrete terms of this case, that the state has chosen to allot thirty-some judges to Dallas County and only one to another county is not relevant. Submerging votes of protected minorities by a cohesive white majority is relevant.

It is perverse now to reason that because the elections of state judges are free of the Reynolds' command of numerical equality, an elected judiciary is a fortiori free from the racial equality commands of the Civil War Amendments and the Voting Rights Act. It is perverse because even the defenders of the "political thicket" doctrine at all times maintained that the courts must hold to the core values of the Civil War Amendments. For example, Justice Frankfurter, in his famous dissent to the Court's entry into the political thicket in Baker v. Carr admitted, joined by Justice Harlan, that "explicit and clear constitutional

imperatives guided judicial intervention in state government on the issue of black disenfranchisement." *Baker v. Carr*, 369 U.S. 186, 285-86 (1962) (Frankfurter, J., dissenting).

The courts have struggled to develop a measure of dilution stemming from the combination of racial voting patterns and state election practices. Gingles itself was the first detailing of that enterprise by the Supreme Court. At earlier times, various justices have referred to our efforts to do so in *Zimmer v. McKeithen* as amorphous. But, this difficulty has nothing to do with the inapplicability of the command of numerical equality, nor is its difficulty peculiar to judicial elections. We remind that the effort in this case to measure the submerging of black and Hispanic voting power *begins* with a system that is numerically perfect--county-wide elections.

We are pointed to several lower court opinions stating

that judges are not "representative."[8] These cases held that the prohibition against geographical discrimination does not reach judicial elections. The argument is that because many of these courts held that judges are not "representatives," Congress must have meant a similar exclusion in its use of the word. We disagree. Words come to their full meaning in context. This argument of incorporated definition is unsupported by a trace of legislative history and is no more

[8] See, e.g., *Concerned Citizens of Southern Ohio, Inc. v. Pine Creek Conservancy Dist.*, 473 F. Supp. 334 (S.D. Ohio 1977); *The Ripon Society, Inc. v. National Republican Party*, 525 F.2d 567 (D.C. D.C. 1975), cert. denied, 424 U.S. 933 (1976); *Fahey v. Darigan*, 405 F. Supp. 1386 (D.C.R.I. 1975); *Gilday v. Board of Elections of Hamilton County, Ohio*, 472 F.2d 214 (6th Cir. 1972); *Wells v. Edwards*, 347 F. Supp. 453 (M.D. La.), aff'd, 409 U.S. 1095 (1972); *Buchanan v. Gilligan*, 349 F. Supp. 569 (N.D. Ohio 1972); *Holshouser v. Scott*, 335 F. Supp. 928 (M.D.N.C. 1971), aff'd, 409 U.S. 807 (1972); *Irish v. Democratic-Farmer-Labor Party of Minnesota*, 287 F. Supp. 794 (D.C. Minn.), aff'd, 399 F.2d 119 (8th Cir. 1968). But cf. cases dealing with the Voting Rights Act, *Southern Christian Leadership Conference of Alabama v. Siegelman*, 714 F. Supp. 511 (M.D. Ala. 1989); *Clark v. Edwards*, 725 F. Supp. 285 (M.D. La. 1988); *Mallory v. Eyrich*, 839 F.2d 275 (6th Cir. 1988); *Martin v. Allain*, 658 F. Supp. 1183 (S.D. Miss. 1987); *Lefkovits v. State Board of Elections*, 400 F. Supp. 1005 (N.D. Ill. 1975), aff'd, 424 U.S. 901 (1976). To the extent that any cases from the Sixth Circuit are used to support the proposition that Section 2 of the Voting Rights Act does not encompass judicial elections, they are no longer good law, for the Sixth Circuit specifically held in *Mallory v. Eyrich*, 839 F.2d 275 (6th Cir. 1988), that Section 2 of the Voting Rights Act applies to judicial elections.

than an assertion. Indeed we showed above that Congress meant "representative" to include judges for the purposes of the Voting Rights Act. The Reynolds principle is race neutral, different, as we observed, from the race-based focus of the Voting Rights Act. However problematic locating the principle of one-person, one-vote in the fourteenth amendment may be, race-based concerns are at its core. Nothing in policy or logic suggests that declining to extend the Reynolds principle to judicial elections carries any sway in freeing judicial elections from race-focused concerns.

Wells was distinguished from cases challenging election practices in *Lefkovits v. State Board of Elections*, 400 F. Supp. 1005 (N.D. Ill. 1975) (3-judge court), aff'd mem., 424 U.S. 901 (1976), where the court stated:

> [W]hen a judge is to be elected or retained, regardless of the scheme of apportionment, the equal protection clause requires that every qualified elector be given an equal opportunity to vote and have his vote counted.

Id. at 1012. This was the precise point made by Solicitor General Fried in his successful argument to the Supreme

Court that it should summarily affirm Haith v. Martin.

In Haith the district court held that judicial elections are covered by Section 5 and the preclearance requirements of the Act. The district court found, using an analysis similar to that used by this circuit in Voter Information Project v. Baton Rouge, 612 F.2d 208 (5th Cir. 1980), that although the one-person, one-vote principle may not apply to judicial elections, claims with respect to the Voting Rights Act do not deal with numerical apportionment, but with discrimination. The court held that "the Act applies to all *voting* without any limitation as to who, or what, is the object of the vote." 618 F. Supp. at 413.[9] In short, Haith rejects the suggestion that inapplicability of the Reynolds principle is any barrier to the application of the Voting

[9] The changes required to be precleared in *Haith* had to do with the elections of trial judges. The district court did not reach the merits of any vote-dilution claims, for it had no jurisdiction to do so. New voting practices must be submitted to either the Attorney General or the United States District Court for the District of Columbia for preclearance. Other district courts only have jurisdiction to decide whether a practice is a change requiring preclearance. Consequently, the merits of a vote-dilution claim with respect to trial judges was not before the Supreme Court.

Rights Act. We are bound by Haith, and the relevance of that bind turns on whether Section 5, dealt with in Haith, and Section 2 are coextensive in their application to the judicial elections. We turn now to that question.

E.

Defendants have raised no compelling reason to distinguish between Section 5 and Section 2 with respect to their applicability to judicial elections. To distinguish the Sections would lead to the incongruous result that if a jurisdiction had a discriminatory voting procedure in place with respect to judicial elections it could not be challenged, but if the state sought to introduce that very procedure as a change from existing procedures, it would be subject to Section 5 preclearance and could not be implemented. Sections 2 and 5 operate in tandem, with Section 2 prohibiting the continued use of discriminatory practices, and Section 5 preventing the imposition of new discriminatory practices to replace those condemned in those areas subject

to preclearance. Section 5 contains language defining its scope that is almost identical to the language in Section 2: "any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting . . . ."

There are important differences in the two sections, however. Section 5 requires preclearance of any new voting practices and procedures, and, in determining whether or not a new practice is entitled to preclearance, only the effect of the new practice is considered. *City of Lockhart v. United States*, 460 U.S. 125, 103 S.Ct. 998 (1983); *Beer v. United States*, 425 U.S. 130 (1976). This has been described as a retrogression test, with preclearance denied only if the new practice has a retrogressive effect, rather than a results test, for the effects of the existing system on minorities are not considered. Thus in Section 2 the entire scheme of voting practices and procedures is considered to see whether it results in less than an equal opportunity to participate in the

political process, whereas under Section 5 only the effects of new practices and procedures are considered. Section 2 is, therefore, arguably more intrusive than Section 5,[10] for Section 5 only regulates whether or not changes may be implemented, whereas Section 2, if a violation is found, can lead to the dismantling of an entire system of voting practices that may have been in place for many years. This is a distinction between the two sections, but our question must be whether the difference means that Section 5 applies to judicial elections, but Section 2 does not. There appears to be no relevant reason why judicial elections are so different from legislative or executive elections that both

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[10] Some see Section 5 as being the most intrusive aspect ot the Voting Rights Act:

> This so-called "preclearance" requirement is one of the most extraordinary remedial provisions in an Act noted for its broad remedies. Even the Department of Justice has described it as a "substantial departure . . . from ordinary concepts of our federal system"; its encroachment on state sovereignty is significant and undeniable. The section must, therefore, be read and interpreted with care.

United States v. Sheffield Board of Comm'rs, 435 U.S. 110, 141 (1978) (Stevens, J., dissenting) (footnote omitted). See also *Katzenbach*, 383 U.S. at 358-62 (Black, J., dissenting).

sections should apply to one and not the other.

The Voting Rights Act plainly covered judicial elections before the 1982 amendments. It is equally plain that there is little evidence that Congress intended any retrenchment by its 1982 amendments. In sum, defendants are left with the unconvincing argument that the changes of the 1982 amendments were fundamental in ways unique to judicial elections. Certainly, the Voting Rights Act intrudes heavily into state matters but it is no more specifically intrusive in judicial elections than in any others. We would hold that Section 2 of the Voting Rights Act applies to judicial elections.

II.

We now turn to the quarrel with the county-wide election of Texas trial judges. The Voting Rights Act does not purport to change the choices by a state of the duties and means for their discharge it gives to a particular office it chooses to create. Rather, the Act accepts these state

creatures but patrols for impermissible vote dilution of minority voting power caused by the features of the election process in combination with racially molded voting patterns in any election of such officials. The statute, however, gives no right to choose how the combination will be broken. It is important, then, that we keep in mind that the analysis of *Thornburg v. Gingles* is relevant only to an inquiry into whether an at-large election impermissibly dilutes minority voting strength; it is not a way of assessing every claimed vote dilution.

Texas has structure its government such that it wields judicial power at the trial level through trial judges acting separately, with a coterminous or linked electoral and jurisdictional base, each exercising the sum of judicial power at that level, and all with review by courts acting collegially. We are persuaded that, for purposes of the Voting Rights Act, because the fact and appearance of independence and fairness are so central to the judicial task, a state may

structure its judicial offices to assure their presence when the means chosen are undeniably directly tailored to the objective. The choice of means by Texas here--tying elective base and jurisdiction--defines the very manner by which Texas' judicial services are delivered at the trial court level. These means define the office. Nothing in the Voting Rights Act grants federal courts the power to tamper with these choices. It requires no narrow reading to conclude that the statute does not by its terms purport to do more. Stated in traditional fourteenth amendment terms, there is compelling necessity sufficient to overcome the strict scrutiny of state acts impinging upon a fundamental interest. We would not lightly suppose that the Voting Rights Act reached further than the Civil Rights Amendments except for dispensing with the requirement of purposeful violation.

It follows that inquiry into the Section 2 claims proceeds by accepting that trial judges are officials exercising the full authority of their positions alone whose full authority has its

source in the electors from a district coterminous with their jurisdiction. There can be no dilution of votes for a single judge because each judge holds a complete judicial office. This feature of the trial judge will alone decide this case but, as we will explain, we need not rest only on this proposition. Rather, that the trial judges act singly is also integral to the linking of jurisdiction and elective base.

A.

The district courts are the primary trial courts in Texas. Indeed, the constitution of the Republic of Texas provided:

> The Republic of Texas shall be divided into convenient judicial districts, not less than three, nor more than eight. There shall be appointed for each district a judge, who shall reside in the same, and hold the courts at such times and places as Congress may be law direct.

Guittard, Court Reform, Texas Style, 21 Sw. L.J. 451, 456 (1967). The first state constitution, adopted in 1845, contained essentially the same provision in article IV, section 6. This provision was amended in 1850 to allow for the election of district judges by the people, but the subsequent

constitution of 1861 provided that district judges were to be appointed. Tex. Const. art. V, § 7, interpretive commentary (1876, amended 1985). Texas constitutions adopted since 1861, including the current constitution, which was adopted in 1876, have provided for elected district judges.

All the constitutions have provided that the district courts are to be held by district judges chosen from defined districts, following the pattern of the Constitution of the Republic of Texas. Although in the Constitution of the Republic of Texas the number of district courts was limited to not more than eight, subsequent constitutions have left the number of courts to the legislature. All Texas constitutions, including the current one, before it was amended in 1985, suggested that each district would be served by only one judge. See Tex. Const. art V, § 7 (1876, amended 1985) ("[f]or each district there shall be elected . . . a Judge . . . ."). A one judge per district system, however, presupposes districts of substantially equal population.

Guittard, supra at 456. Thus, with the growth of the population in certain counties it became necessary for the legislature to make adjustments.

The system challenged in this case was set up according to this pattern. See Tex. Gov't Code §§ 24.001-.954 (Vernon 1988 & Supp. 1990). With the exception of the 72nd district, each challenged judicial district in the nine targeted counties is coextensive with one county. The 72nd district is composed of two counties. Id. § 24.174 (Vernon 1988). Since 1907 district judges have been elected county-wide. In 1985, however, a section was added to article V of the 1876 Constitution which specifically allows the creation of judicial districts smaller than a county. Tex. Const. art. V, § 7a(i) (1985). A majority of the voters in the county must authorize the division. Id. This power has yet to be exercised.[11]

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[11] The only time a district has been drawn smaller than a county was when the legislature divided both Dallas and Bexar counties into two districts, each district having jurisdiction throughout the whole county. The judge for each district was elected by the voters in the

The district courts in multi-district counties were unified for certain administrative purposes in 1939 through the passage of the Special Practice Act, which is now, for the most part, found in Tex. R. Civ. P. 330 (e)-(i). Guittard, supra at 457-58. The relevant parts of the Special Practice Act essentially provide that cases can be freely transferred between judges and that any judge can work on any part of a case including preliminary matters. Also, "[a]ny judgment rendered or action taken by any judge in any of said courts in the county shall be valid and binding." Tex. R. Civ. P. 330 (h).

The Administrative Judicial Act, originally passed in 1927 and subsequently amended on several occasions, divides Texas into nine administrative regions, each with a presiding judge appointed by the governor with the advice

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district in accordance with the constitution's command, Tex. Const. art. V, § 7 (1876, amended 1985), as opposed to being elected by county-wide vote as now. Thus, we cannot say that there is *no* precedent for dividing counties into geographically distinct districts. We can say that the state experimented with 2 of its 25 counties but abandoned the idea nearly a century ago. The statutes dividing Bexar and Dallas Counties into two districts were repealed in 1895 and 1907, respectively.

and consent of the senate. See Tex. Gov't Code §§ 74.005, .042 (Vernon 1988). The "presiding administrative judge is the key administrative officer in the Texas judicial system." Guittard, supra at 459. He is empowered to assign judges as necessary within his region. Id. §§ 74.052-056 (Vernon 1988 & Supp. 1990); see also Judicial Administration Rule 8 (Vernon 1988 & Supp. 1990). He is required to call two meetings of all judges in his administrative region each year and any other meetings as necessary. Tex. Gov't Code § 74.048(a) (Vernon 1988); Judicial Administration Rule 4 (Vernon 1988 & Supp. 1990). This conference is for "consultation and counseling concerning the state of the civil and criminal business" and is empowered to promulgate administrative rules, rules governing the order of trials and county-wide recordkeeping, and other rules deemed necessary. Tex. Gov't Code § 74.048(b)-(c) (Vernon 1988).

The local administrative judge is elected by a majority vote of all the judges in the county, including both district

and statutory judges. Id. § 74.091 (Vernon 1988 & Supp. 1990). His duties on the county level are similar to those of the presiding administrative judge. See id. § 74.092. The local administrative judge has the power to assign judges within his county. Id. § 74.094. Under the leadership of the local administrative judge, the district and statutory judges in each county are directed to adopt local rules of administration. Id. § 74.093. These rules must provide for, among other things, the "assignment, docketing, transfer, and hearing of all cases" and "fair and equitable division of caseloads." Id. § 74.094(b)); see also Judicial Administration Rule 9(b) (Vernon 1988 & Supp. 1990). All local rules, of course, must be consistent with state and regional rules. Judicial Administration rule 10 (Vernon 1988). In this regard, the present Chief Justice of Texas testified at trial that the only collegial decision-making by district judges in a county is in the handling of some administrative matters.

B.

A distinction was drawn between multi-member and single-member structures in *Butts v. City of New York*, 779 F.2d 141 (2d Cir. 1985), cert. denied, 478 U.S. 1021 (1986). In that case the plaintiffs contested a primary run-off law, contending that it violated the Equal Protection Clause and the Voting Rights Act. The Second Circuit noted that one of the ways that a class of citizens may have less opportunity to participate is when there are electoral arrangements that diminish a class's opportunity to elect representatives in proportion to its numbers. The court distinguished, however, between multi-member bodies, where at-large elections may produce this result, and elections for single-member offices. *Butts*, 779 F.2d at 148. The court found that the Supreme Court had made this distinction implicit in *City of Port Arthur v. United States*, 459 U.S. 159 (1982), where the Supreme Court struck down a run-off requirement for seats on a multi-member city

council, but did not mention the run-off requirement for mayor. The Eleventh Circuit followed *Butts* in *United States v. Dallas County, Ala.*, 850 F.2d 1430 (11th Cir. 1988), in holding that "the at-large election of the probate judge is permissible under the Voting Rights Act with respect to the judicial aspects of that office." Id. at 1432 n.1.

The positions at issue in *Butts* and *Dallas County*, and the position not considered in *Port Arthur*, were what can be viewed as traditional single member offices, i.e., mayor, city council president, single probate judge, or comptroller. There was only one of each office in a given geographical area, and no problem with overlapping jurisdictions. Here, there are many judges with overlapping jurisdictions. Nonetheless, each acts alone in wielding judicial power, and once cases are assigned there is no overlap in decision-making.

Indeed there are special courts created within some judicial districts that emphasize the single-member nature of

the offices, for not all of the judges handle the same type of work. Some are courts of general jurisdiction, but some judges are elected specifically to handle juvenile cases, or family law cases, or criminal cases. To that extent they are separate office, just as county treasurer and sheriff are different positions. Of course, many of the judges do handle the same type of cases and the cases are assigned to any of these judges within a given geographical jurisdiction. There are many of them within a geographical area, and the plaintiffs would find this dispositive. A United States district court in Alabama has held that Alabama trial courts similar to the Texas courts are multi-member positions.[12] *Southern Christian Leadership Conf. v. Siegelman*, 714 F. Supp. 511

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[12] The district court in *Clark v. Edwards*, 725 F. Supp. 285 (M.D. La. 1988), also held that the at-large system of electing trial judges in Louisiana impermissibly diluted black voting strength, assuming that districts with more than one judicial position were multi-member districts. In *Haith v. Martin*, 618 F. Supp. 410 (D.C.N.C. 1985), aff'd mem., 106 S.Ct. 3268 (1986), the district court referred to the superior court judges in North Carolina, also trial judges, as "designated seats in multi-member districts." Id. at 414. The issue there was not a violation of Section 2, however, but whether Section 5 of the Act applied to such judicial elections, requiring preclearance of changes.

(M.D. Ala. 1989). The court considered *Dallas County* and *Butts*, but concluded that

> Although neither court expressly defined the term "single-member office," it is clear to this court that the phrase, as used in those cases, refers to a situation where under no circumstances will there ever be more than one such position in a particular geographic voting area.

Siegelman, 714 F. Supp. at 518.

The Court found that exclusive authority alone does not define single-member official. Id. We disagree with this view of multi-member versus single-member office and agree with the argument made by defendants in *Siegelman* that

> the hallmark of a single member office, as [the Butts and Dillard] courts use the term, is not the fact that the office is traditionally held by only one individual but, more importantly, the fact that the full authority of that office is exercised exclusively by one individual.

714 F. Supp. at 518.

Viewing district judges as members of a multi-member body is flawed in concept. Before any suits are filed, before any cases are assigned, there is a group of judges with concurrent jurisdiction, and plaintiffs maintain that this group

should have minority members, so that minorities' views and concerns are considered by the judges who decide important issues in their lives. The problem is that once a case is assigned, it is decided by only one judge. The other judges have absolutely no say over the disposition of that case, and no influence over the deciding judge. One commentator has described the Texas system as a "one-judge, one court organization at the trial level, with rigid jurisdictional lines and with each judge largely independent of any supervisory control, except by way of appellate review." Guittard, Court Reform Texas Style, 21 Sw. L.J. at 455.

C.

It is implicit in *Gingles* that the effect of election practices must be considered after taking the underlying definition of the offices of state government as given. Even the sharply divided Gingles Court agreed that its inquiries were only into the legality of at-large methods of electing representatives to a larger governing body. Section 2 does

not grant federal courts the authority to disregard the states' basic arrangements. We would not rest on inference to support such a grant of authority. It would run counter to fundamental concepts of federalism:

> As broad as the congressional enforcement power is [under the fifteenth amendment], it is not unlimited. Specifically, . . . the power granted to Congress was not intended to strip the States of their power to govern themselves or to convert our national government of enumerated powers into a central government of unrestrained authority over every inch of the whole Nation.

Oregon v. Mitchell, 400 U.S. 112, 128 (1970).

The State of Texas has chosen to have trial judges who wield full judicial authority alone, a structure we must accept. Subdistricting would not create an equal opportunity for representation in decision-making, for

> [t]here can be no equal opportunity for representation within an office filled by one person. Whereas, in an election to a multi-member body, a minority class has an opportunity to secure a share of representation equal to that of other classes by electing its members from districts in which it is dominant, there is no such thing as a "share" of a single-member office.

Butts, 779 F.2d at 148. What subdistricting does, rather

than provide minorities with representation in all decisions, is to simply allocate judges, and thus judicial decisions, among various population groups. The Voting Rights Act does not authorize such allocation. It cannot be made to authorize allocating judges by simply restating the office of district judge as a shared office or by asserting that the "function" of an office is not relevant. Saying that district judges in fact share a common office that can be subdistricted does not make it so. Nor does the assertion that function is not relevant make sense. Function is relevant to the threshold question of what features of the state arrangement define the office.

These judges all hear and decide their own docket of cases, and their character as single-office holders instead of members of a multi-member body is emphasized by the problems inherent in attempting to break the linkage of jurisdiction and elective base. To do so may well lessen minority influence instead of increase it, surely not what

Congress intended when it enacted the Voting Rights Act or its amendments. The current system of electing district judges at least permits voters to vote for each and every judicial position within a given district, generally a county. It is more likely, therefore, that minority voters will have some influence on the election of each judge. Under the district court's order, each voter would have the opportunity to vote for only one judge in each district, the judge whose position was assigned to the subdivision. At the same time, a minority litigant will be assigned at random to appear before any district judge in the county. Under the district court's orders it is much more likely than not that a minority litigant will be assigned to appear before a judge who is not elected from a voting district with greater than 50% minority population. Instead, the great majority of district judges will be elected from new voting subdistricts with negligible minority populations and, consequently, negligible minority political influence on the outcome of those elections. Under

the new order requiring election of judges from subdistricts, 9 of the 59 judicial positions in Harris county would be elected from minority-dominated subdivisions. Minority voters would have very little influence over the election of the other 50 judges, for the minority population is concentrated in those 9 subdivisions. When minority members are litigants, however, they would not necessarily appear before one of the judges elected from a minority-dominated subdivision. Instead, a minority member would have an 84.75% chance of appearing before a judge who has little direct political interest in being responsive to minority concerns.[13] The minority member would have a 98.3% chance of appearing before a judge in whose election he had not been able to vote. This is not like the situation in *Chisom*, where the judges were all part of one body, and every case that went to the Louisiana Supreme Court was

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[13] Moreover, cases without minority parties, but nonetheless concerning issues important to minority groups, would have an 84.75% chance of being assigned to a judge with no accountability to minorities living in the county.

heard by all of the judges, so every individual litigant from the state of Louisiana was assured that a judge for whom he had an opportunity to vote would hear his case.

Requiring subdistricting for purposes of electing district judges, unlike other offices, would change the structure of the government because it would change the nature of the decision-making body and diminish the appearance if not fact of its judicial independence--a core element of a judicial office. Trial judges would still exercise their full authority alone, but that authority would no longer come from the entire electorate within their jurisdictional area. Subdistricting would result in decisions being made for the county as a whole by judges representing only a small fraction of the electorate. This does not occur when members of larger bodies are elected from subdistricts, for when the body makes a decision, the interests of all electors are still represented in each decision. When the decisions are not made by a group, the nature of the decision-making

body as representative of all of the electors is fundamentally changed through subdistricting. The State of Texas has struck for the essential and defining quality of independence by defining the office of trial judge as a person who judges singly and whose power is derived from an electoral base equal to jurisdictional base. Trial judges are not members of a multi-member body, although there are many district judges, for the district judges do not decide cases as a body. Disregarding the state's insisted linkage of elective base and jurisdiction for single office holders by subdistricting or ignoring their discrete activity, causes a fundamental change in the very office of district judge, a result not contemplated by the Voting Rights Act. These elements define the office; they are far more than the "manner" of election.

One can view the single-official doctrine as being no more than a statement of the mechanical impossibility of gaining greater representation for minorities. This approach is simply a resignation to the reality that if there is only one

official, there can only be an at-large election. A second view is that the single official exception expresses far more. This view recognizes that we must accept the state's definition of the office, and that where functions are singly exercised, providing single-member districts is no more than proportional representation in its most superficial form.

Some district courts have proceeded with the first view, concluding that the single official doctrine is inapplicable where more than one official was elected at-large by the same electorate. It is plain that this entire suit rests upon the premise that the single official exception reflects no more than the reality that there is nothing to divide unless there is more than one judge in a single county. It is no accident that this suit attacks only the nine counties with multiple district judges and minority populations. But, the right secured to minorities under Section 2 of the Voting Rights Act to not have their vote diluted is expressed in the assertion that their interests are to be represented in

governmental decisions. Where judges make their decisions alone, electing judges from single member districts only increases the likelihood that a small number of governmental decisions will be influenced by minority interests, while minority interests will not be represented at all in the majority of judicial decisions. In this way subdistricting would work a fundamental change in the scheme of self governance chosen by the state of Texas, for it would change the authority behind the decisionmaking body of the Texas courts--and in doing so it would retard, not advance the goals of the Voting Rights Act.

In sum, the single-official concept as we apply it here, whatever its full import in other contexts, is no more than a specific application of the basic principle that analysis under the Voting Rights Act proceeds without changing the state's definition of the office. With the judges acting alone, each judge the decision-making body, a coterminous electoral and jurisdictional base is a core component of the office.

Subdistricting would change that office in ways wholly different from changing the selection of members of a governing body as distinguished from the body itself.

D.

Plaintiffs argue that the state's interest in linking jurisdiction and elective base is weakened because in 1985 Texas granted authority to counties to provide for the election of district judges from smaller geographical units. There are two difficulties with this argument. First, no county has elected to do so, and, second, the change only allows the creation of districts smaller than a county. It does not purport to authorize the election of district judges with countywide jurisdiction from districts smaller than the county.

It is also suggested that there is no unacceptable appearance of bias (translate, you still have a court of law) in the prosecution of claims where one litigant is a constituent of a district judge and the other is not. The

argument continues that such a circumstance is presented where one of the parties is from another county. This suggestion ignores the fact that the state recognized that elimination of this risk and appearance of bias was essential to the office it was creating by an elaborate set of rules controlling venue. Indeed, Texas has perhaps the most developed venue practice of any of the states, doubtlessly attributable to its diversity and size, allowing a mini-trial of venue facts. Whether a trial proceeds in the plaintiff's home county in El Paso or a defendant's home county in Dallas is of great moment. In sum, the intercounty bias argument proves, rather than defeats, the point. Avoiding the fact and appearance of bias is a powerful state interest. There is no corresponding system of venue rules for a subdistricted county. Rather, as we explained, the state insists on linking the elective and jurisdictional base. Texas wants a trial *judge*, not a partisan. We are persuaded that Texas has a compelling interest in linking jurisdiction and elective base

for judges acting alone. By definition there can be no dilution from the county-wide election of such single officials.

JOHNSON, Circuit Judge, dissenting:

Introduction

Let it be clear at the outset: this case presents compelling allegations of *racial discrimination* brought under the United States Voting Rights Act by black and Hispanic minorities. Congress intended the Voting Rights Act to be a key measure in its efforts to erase a haunting legacy of racial discrimination in the United States. The majority and concurring opinions in this case, in reasoning inconsistent with this Court's long history of progressive and enlightened interpretation of civil rights legislation,[1] seriously cripple this congressional intent. Despite unmistakable congressional statements concerning the broad scope of the Voting Rights

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[1] This Court's history of courageous efforts to end racial discrimination in the South are well know. *See* J. Bass, *Unlikely Heroes* (1981). For instance, in 1973 this Court handed down a landmark Voting Rights Act decision, *Zimmer v. McKeithen*, 485 F.2d 1297 (5th Cir. 1973) (en banc), *aff'd sub nom. East Carroll Parish School Board v. Marshall*, 424 U.S. 636 (1976) (per curiam), which established an enlightened set of standards to be applied under the Voting Rights Act's "totality of the circumstances" test. The Supreme Court later cited *Zimmer* as the authoritative exposition of these standards. *See Thornburg v. Gingles*, 478 U.S. 30, 36 n.4 (1986).

Act, the majority and concurring opinions have taken different directions to achieve the same result: they deny minority groups the right to challenge discriminatory practices in judicial elections.

The majority opinion is completely isolated. No previous court has ever even suggested that judicial elections might be exempt from the reach of Section 2 of the Voting Rights Act. To the contrary, this Court, the United States Court of Appeals for the Fifth Circuit, had earlier concluded that Section 2 applied to *all* elections, including judicial elections. Not only does the majority opinion reverse this two year old precedent, but it also demonstrates a shocking lack of concern for the urgently argued position of the Attorney General, who has consistently maintained that the Voting Rights Act reaches *all* elections. The majority's isolated opinion stands as a burning scar on the flesh of the Voting Rights Act; the majority opinion is not simply wrong, it is dangerous.

Judge Higginbotham's concurring opinion ("the concurrence") is scarcely removed from the majority opinion. Like the majority opinion, the concurrence is wholly inconsistent with the reasoned decisions of numerous courts and the established position of the Attorney General. The concurrence purports to rely upon compelling precedent from another federal court. But in truth, the concurrence is entirely premised upon a single case that is *not* authority for the concurring opinion's eccentric holding. The scar the concurrence would leave on the Voting Rights Act is no less injurious than that the majority inflicts; the concurrence is not only wrong, it too is dangerous.

Several truths are self-evident from the clear language of the statute that had heretofore opened the electoral process to people of all colors. The Voting Rights Act focuses on the *voter*, not the elected official. The Act was intended to prohibit racial discrimination in *all* voting, the sole inquiry being whether the political processes are equally open to all

persons, no matter their race or color. The Act is concerned only with the intent of persons of "race or color" in casting a ballot; it has no interest in the function of the person holding the office. Yet, the majority and concurring judges carve out a sweeping exception to the Act's intended scope, concluding that the Voting Rights Act does not apply to judicial elections (or at least some judicial elections). I refuse to join my fellow judges' purposeful and calculated deprivation of the Voting Rights Act's ability to eliminate racial discrimination in the electoral process.

I.

THE MAJORITY OPINION

In 1988 this Court handed down its decision in *Chisom v. Edwards*, 839 F.2d 1056 (5th Cir.), *cert. denied sub nom. Roemer v. Chisom*, 109 S. Ct. 390 (1988), which held that Section 2 of the Voting Rights Act applies to judicial elections. Today, in an opinion that mutilates familiar

precepts of statutory construction,[2] the majority rudely abandons the *Chisom* precedent.[3] The majority, concluding

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[2] Purporting to *apply the text of the statute*, Majority Opinion at 23 n.14, the majority essentially concludes that the term "representative" in Section 2 of the Voting Rights Act is synonymous with the term "legislator." To the contrary, the majority is not applying the text of the statute, but rather it is applying its own novel definition of an isolated term appearing on one single occasion in the statute. Be that as it may, the majority still should never have reached the point of *literally applying the text of the statute*. In this Circuit, it is established law that "literal statutory construction is inappropriate if it would produce a result in conflict with the legislative purpose clearly manifested in an entire statute or statutory scheme or with clear legislative history." *Almendariz v. Barrett-Fisher Co.*, 762 F.2d 1275, 1278 (5th Cir. 1985). Conveniently, the majority opinion ignored this established law, probably because it knew that its "literal" definition of "representative" was inconsistent with other language in the Voting Rights Act and the legislative history of the Act.

[3] On May 27, 1988, a panel of this Court denied a Petition for Rehearing and for Rehearing En Banc in *Chisom v. Edwards* because "*no* member of this panel nor *Judge in regular active service on the Court ... requested that the Court be polled on rehearing en banc.*" (emphasis added). Despite the denial of rehearing in *Chisom* concerning the applicability of Section 2 of the Voting Rights Act to judicial elections, the majority now utilizes the grant of en banc consideration in the instant case to reconsider *Chisom*. Such action, while certainly not prohibited, offends the familiar principle of stare decisis. It cannot be stated too adamantly: the majority of this Court is reconsidering a decision on which, just barely two years go, no member of the Court even suggested holding the mandate in order to explore the possibility of a need to reconsider the case en banc.

The capricious path the instant case was forced to take to accomplish the rejection of *Chisom v. Edwards* is revealing. As late as January 11, 1990, just as a special session of the Texas legislature was convened, a panel of this Court, two members of which are now aligned with the majority position, entered an order staying the judgment of the district court in the instant case. The express intent of this order was to afford the legislature a reasonable time to address the issues presented in

that the Act does not apply to *any* judicial election, delivers a devastating blow to the Act's continuing ability to eliminate racial discrimination in voting. At this stage, there is little reason to revisit in detail Judge Higginbotham's refutation of

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the federal district court's decision. In part, it recited:

IT IS ORDERED that appellants' motion for stay pending appeal are [sic] GRANTED. We do so in order that the State of Texas may be allowed a reasonable opportunity to address the problem presented by the holding of the district court [in the instant case] entered November 8, 1989, that the state system of selecting judges is invalid as violating Section 2 of the Voting Rights Act. ...

That holding, if sustained on appeal, will require an organic and wholesale review and reconstitution of the Texas judicial selection system, a task which should be addressed and carried out by the state's elected representatives, rather than by the federal courts. Only if it becomes apparent that the state is unwilling to act with measured and appropriate speed in this regard should our courts intervene. When the State has had a reasonable period within which to address the problem presented in a special session of the Legislature, the Court will entertain a motion to dissolve. That has not yet occurred; when it does, we will be amenable to a motion to dissolve the stay which we enter today.

League of United Latin American Citizens v. Clements, No. 90-8014 (5th Cir. Jan. 11, 1990) (unpublished). The stay order, which cited *Chisom* and presumed the validity of *Chisom*, remained in effect until March 28, 1990, when it was dissolved by the panel which originally heard the instant case. That same day, the members of this Court voted to hear the case en banc on an expedited schedule. The panel opinion here was rendered on May 11, 1990, and the en banc Court heard oral arguments on June 19, 1990.

The presumption of this Court as late as January 11, 1990, concerning the validity of *Chisom* and its inescapable holding that the Voting Rights Act applies to all judicial elections was obliterated like parched grass in the face of a late summer prairie fire. The fire is beyond reason or control as it races across the prairie--yet its cause is unknown.

the majority's attack on *Chisom v. Edwards*. It is sufficient simply to reiterate a few essential--and well established--points.

Congress enacted the Voting Rights Act in 1965 "to rid the country of racial discrimination in voting." *South Carolina v. Katzenbach*, 383 U.S. 301, 315 (1966). Since the inception of the Act, the Supreme Court has consistently interpreted the Act in a manner which affords it "the broadest possible scope" in combatting racial discrimination. *Allen v. State Board of Elections*, 393 U.S. 544, 567 (1969). Other courts, including this Court, have followed the Supreme Court's lead. *See, e.g., Zimmer v. McKeithen*, 485 F.2d 1297 (5th Cir. 1973) (en banc), *aff'd sub nom. East Carroll Parish School Board v. Marshall*, 424 U.S. 636 (1976) (per curiam). As a consequence, the Voting Rights Act regulates a wide range of voting practices and procedures. *See United States v. Board of Commissioners*, 435 U.S. 110, 122-23 (1978).

For a resolution of the instant case, it is unnecessary to look beyond Section 14(c)(1) of the Voting Rights Act, which defines the salient word "voting" and describes the range of election practices that are encompassed within the regulatory sphere of the Act:

> The terms "vote" or "voting" shall include *all* action necessary to make a vote effective in *any* primary, special, or general election, including, but not limited to, registration, listing pursuant to this subchapter or other action required by law prerequisite to voting, casting a ballot, and having such ballot counted properly and included in the appropriate totals of votes cast with respect to *candidates for public or party office* and propositions for which votes are received in an election.

42 U.S.C. § 19731 (1982) (emphasis added). Can this language in the Act itself be ignored? It is indisputable that Texas' elected judges are "candidates for public or party office." Thus, by its express terms, the Voting Rights Act applies to state judicial elections. Indeed, this is the only result consistent with the plain language of the Act.

Nonetheless, relying on a restrictive definition of the single word "representative" in Section 2 of the Act, the

majority determines that the Voting Rights Act does not necessarily apply to all "candidates for public or party office." Such a conclusion breaches several established canons of statutory construction. The majority's restrictive definition of "representative" violates the requirement that remedial legislation such as the Voting Rights Act be broadly construed. *See Allen*, 393 U.S. at 565. The majority's reliance on an isolated term violates the requirement that a reviewing court examine a statute in its entirety. *See Duke v. University of Texas at El Paso*, 663 F.2d 522, 525 (1981), *cert. denied*, 469 U.S. 922 (1984).

Moreover, the majority's awkward decision violates the requirement that a reviewing court avoid statutory interpretations that lead to an absurd or inconsistent result. *See United States v. Turkette*, 452 U.S. 576, 580 (1981). As just one example of the majority opinion's troubled logic, consider the majority's crude attempt to distinguish judges from other elected officials. The majority repeatedly urges

that judges are not "representatives" within the comprehension of the Voting Rights Act because judges are not *advocates*; that is, judges "speak for and to the *entire* community, never for segments of it and still less for particular individuals." Majority Opinion at 19 (emphasis in original). Yet, at the same time, the majority recognizes that this Court has already found that many other elected officials are "representatives," officials who also cannot fairly be described as advocates for segments of the community or particular individuals. Majority Opinion at 23 n.14. A county sheriff or court clerk, for example, speaks for and to the entire community--is responsible for and to the entire community. If a county sheriff or court clerk, as with a judge, attempted to act in a partisan manner, that person would be grossly deficient in his or her duties.

It should be clear by this point that the majority's decision is less an attempt to interpret congressional intent concerning the reach of the Voting Rights Act, and more an

attempt to effectuate the majority's policy determination that state judicial elections should be immune from federal congressional interference. Perhaps the strongest evidence of the majority's desire to supplant the stated aims of Congress with its own policy preferences is its conspicuously casual treatment of the position of the United States Attorney General. In *United States v. Board of Commissioners*, 435 U.S. at 131, the Supreme Court concluded that the Attorney General's interpretation of the Voting Rights Act is persuasive evidence of the original congressional understanding of the Act, "especially in light of the extensive role the Attorney General played in drafting the statute and explaining its operation to Congress." Id. In the present case, the Attorney General has filed an amicus curiae brief which maintains that the scope of Section 2 of the Voting Rights Act reaches *all elections, including judicial elections*. But remarkably, the majority dismisses the Attorney General's position, noting simply that it does not seem to

"weigh very heavily in the scales." Majority Opinion at 23.

The application of Section 2 should depend *solely* on the fact of nomination or election. As the Eleventh Circuit has--a Circuit which shares this Court's long tradition of enlightened enforcement of federal civil rights legislation--has noted, "[n]owhere in the language of Section 2 nor in the legislative history does Congress condition the applicability of Section 2 *on the function performed by an elected official*." *Dillard v. Crenshaw County*, 831 F.2d 246, 250-51 (11th Cir. 1987) (emphasis added). By exempting an entire class of elected officials from Section 2 simply on the basis of their judicial *function*, the majority has not only inextricably placed this Court at odds with the conclusions of other circuits, but also has struck a devastating blow to the Voting Rights Act's ability to alleviate racial discrimination in the voting process.

II.

THE CONCURRENCE

Judge Higginbotham's concurring opinion concludes, and I agree, that the Voting Rights Act applies to judicial elections. The concurrence, however, is itself seriously flawed. Critical examination of the concurring opinion's construction of the single office holder exception reveals the error:[4] the concurrence's creative interpretation of the Voting Rights Act would result in the *per se* exclusion from the reach of the Voting Rights Act of elections for the greatest part of the judiciary--state district court judges. In a troubling display of judicial intervention, the concurrence's result-oriented opinion fails even to acknowledge the clear purpose of the Act evidenced in its language and legislative history.

In adopting the Civil War amendments, Congress was propelled by a concern for the emasculation of minority voting strength through the puissant coupling of bigotry with

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[4] The concurrence asserts that there can be no dilution of minority voting strength where the elected official acts independently, regardless of whether there are one or one hundred such official posts in the relevant district.

state supported election practices.[5] Similarly, a century later, Congress enacted the Voting Rights Act for the broad purpose of eradicating racial discrimination in voting across the length and breadth of this nation.[6] In 1982 amendments to the Act, Congress strengthened the Act's promise to ensure minorities equal access to the political process. The Senate Report accompanying the 1982 amendments indicates that the Voting Rights Act was designed not only to correct active discrimination, but to "deal with the accumulation of discrimination." Senate Report Accompanying the 1982 Amendments to the Voting Rights Act at 5. Especially in light of the history and language of the Act, it is axiomatic that the relevant inquiry centers on the *voter*--specifically, the minority voter--*not* on the elected official. The Act is, after all, the *Voting Rights* Act.

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[5] *See* Concurring Opinion at 24.

[6] President Ford's poignant words are as powerful today, fifteen years later: "the right to vote is the very foundation of our American system, and nothing must interfere with this very precious right." President Gerald Ford, Remarks Upon Signing A Bill Extending the Voting Rights Act of 1965 (August 6, 1975).

Section 2 and the Judiciary

The majority opinion concludes that state district court judges are not "representatives" within the comprehension of Section 2 of the Voting Rights Act. However, as the concurrence aptly notes, the term "representatives" in Section 2 is not synonymous with "legislator." Congress intended the Voting Rights Act to prohibit and alleviate discrimination in *all* voting, a term which Congress defined to include any action necessary to make a vote effective in any election with respect to *any candidate* for public or party office.[7] From the language of the Act *as a whole*, it is clear

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[7] The United States Attorneys General, in an unbroken chain, have consistently interpreted the Voting Rights Act broadly, and, more recently, have interpreted Section 2 to reach elected judges. At the time the original Voting Rights Act was passed in 1965, the Attorney General stated that "*every election* in which registered voters are permitted to vote would be covered." *Voting Rights: Hearing Before Subcommittee No. 5 of the House Judiciary Committee*, 89th Cong. 1st Sess. 21 (1965) (emphasis added). In both Chisom v. Edwards, 839 F.2d 1056 (5th Cir.), *cert. denied sub nom.* Roemer v. Chisom, 109 S. Ct. 390 (1988), and in the instant case, the Attorney General filed an amicus brief in which he maintains that the scope of Section 2 reaches all elections, including judicial elections.
Additionally, in a recent Section 5 preclearance review, the Assistant Attorney General denied preclearance of a proposed majority vote, designated post, at-large method of judicial elections in Georgia similar to that under attack in the instant case, concluding in part:

that the term "representative" corresponds with the term "candidate." It is also clear that a contestant in a judicial election is a candidate for public office. Thus, the language and reasoning of the concurring opinion is sound to the limited extent it urges that neither the words nor the legislative history of the Act indicate any intention on the part of Congress to exempt judicial elections from coverage.

This Court has previously addressed the question of the Act's application to judicial elections. In *Chisom v. Edwards*, a case which examined the application of Section 2 in the context of a challenge to Louisiana's system of electing state supreme court justices, a panel of this Court

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Our review of a broad range of evidence in this regard indicates that polarized voting generally prevails in all of the superior court circuits now under review and there is a consistent lack of minority electoral success in at-large elections. Thus, it appears that, in the totality of the circumstances, black voters in these circuits have a limited opportunity to elect their preferred candidates....

> In addition, the state has not shown how its interests are served by circuitwide elections in many of the circuits now at issue where the at-large election feature is in apparent violation of Section 2 of the Voting Rights Act.

Letter from Assistant Attorney General John R. Dunne to Georgia Attorney General Michael J. Bowers (Apr. 25, 1990).

held that Section 2 applies with equal force to judicial elections. As in the concurring opinion in the instant case, the outcome in *Chisom* hinged upon an examination of both the plain language and the legislative history of the Act.

Despite a basic agreement with this Court's earlier analysis in *Chisom*, the concurrence here attempts to shift the focus of the Voting Rights Act from the minority voter to the elected official. This Court recognized in *Chisom* that the term "representative" for purposes of the Voting Rights Act may be defined as *anyone* selected by popular election from a field of candidates to fill an office.[8] The definition of "representative" in *Chisom* intertwines with the statute's definitions of "vote" and "voting" and assures the Act's application to *all* elections. The concurrence in the present case, however, subtly constricts this definition. While acknowledging that Congress used the terms "candidate" and "representative" interchangeably when drafting the Act, the

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[8] *Chisom*, 839 F.2d at 1060.

concurrence defines "representative," at least within the narrow confines of Texas elections for district judges, as "one who is chosen to be responsive to the people and to represent their interests in decisions." Concurring Opinion at 7. The concurrence's definition attempts to precipitously limit the scope of the Act's remedial provisions, emphasizing the position of the office-holder over the status of the voter. The anticipated responsive nature of a particular office (or office holder) is of absolutely no consequence to the initial and dispositive question of whether the office is filled through the use of an electoral process.[9] Nonetheless, the

[9] It is true that one of the Senate Report factors that may be probative in a vote dilution case to establish a Section 2(b) violation is "whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group." S. Rep. at 29. However, the Senate Report emphasizes that "[u]nresponsiveness is not an essential part of plaintiff's case." *Id.* at n.116. In fact, in *Clark v. Edwards*, 725 F. Supp. 285 (M.D. La. 1988), a case involving a vote dilution challenge to the use of multi-member districts and at-large voting to elect Louisiana district court, family court, and court of appeals judges, the district court remarked that the element of responsive representation simply is not a consideration in a judicial election case:

> The Senate Report...also suggested that lack of responsiveness on the part of elected officials to the particularized need of the members of the minority group might be factor in some cases. ... That obviously is not a factor in this case since the only response which a member of the judiciary may make is to rule on all matters fairly and impartially, without favoring or being prejudiced against any group.

Id. at 301. Consequently, while a state's interest in retaining a system which exudes an appearance of impartiality may be considered among the totality of the circumstances, the converse, actual responsiveness, should not be relevant to a claim of vote dilution in the context of a judicial election.

concurrence's definition is necessary to its "single official" argument--which is based in part on an examination of the duties and functions performed by a trial judge once he or she is in office--and the argument that the State has a compelling interest in retaining the current system.

The Minority Voter

Despite Congress' clear statement that the Voting Rights Act applies to *all* voting, the concurrence, through rhetoric surrounding the term "representative," attempts to shift attention from the one casting a vote to the one for whom the vote is cast. Not one word or thought contained in Section 2(a) or (b) supports, or is suggested by the concurrence in support, of this effort. The Voting Rights

Act was designed to eradicate discrimination in voting, and the essential inquiry is whether the political processes leading to the casting of the ballot are equally open to all persons, no matter what their race or color.

Nothing in the language of Section 2 suggests that a reviewing court should concentrate on the type of election under dispute--whether it is for a mayor, an alderman, a legislator, a constable, a judge or any other kind of elected official.[10] Rather, the sole focus of Section 2 is the minority

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[10] Section 2, as amended in 1982, now provides:

(a) No voting qualification or prerequisite to voting or standard practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, as provided in subsection (b) of this section.

(b) A violation of subsection (a) is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided*, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

42 U.S.C. § 1973 (1982).

voter--specifically, whether the minority voter has been allowed the opportunity to participate fully in the democratic process.

> Nowhere in the language of Section 2 nor in the legislative history does Congress condition the applicability of Section 2 on the function performed by an elected official. ... Once a post is open to the electorate, ... if it is shown that the context of that election creates a discriminatory but corrigible election practice, it must be open in a way that allows racial groups to participate equally.

Dillard v. Crenshaw County, 831 F.2d 246, 250-51 (11th Cir. 1987).[11]

The instant case reveals an electoral scheme which is "discriminatory but corrigible." Whenever a number of officials with similar functions are elected from within a discrete geographic area, there exists the inherent potential for vote dilution. The concurrence, however, ignores this verifiable fact, and concludes that, because the full authority of the *elected position* is exercised exclusively by one

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[11] This Court, in *Chisom*, stressed the soundness of the *Dillard* court's reasoning. *Chisom*, 839 F.2d at 1060.

individual, there can be no impermissible dilution of the *minority vote*.

The Voting Rights Act is not concerned with the power and authority vested in the elected office. It is the value and efficacy of the political process accorded the *voter*, not the office holder, which is secured by statute. The Supreme Court's decision in *Thornburg v. Gingles*[12] stressed Congressional concern over the submergence of minority votes as a result of significant white bloc voting. The express language of Section 2(b), which looks only to the "political processes leading to nomination or election" and to whether minority members "have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice," emphasizes this Congressional concern on the *voter* and not the elected official. Congress focused in Section 2 on the elimination of discrimination in *voting* (thus the title of the

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[12] 478 U.S. 30 (1986).

Act), and on the creation of minority opportunities for electoral success. *See Gingles*, 478 U.S. 30, 48 (1986); *Haith v. Martin*, 618 F. Supp. 410, 413 (E.D.N.C. 1985), *aff'd*, 477 U.S. 901 (1986) (the Act applies "to all *voting* without any limitation as to who, or what, is the object of the vote") (emphasis in original).

The concurrence asserts that the essential right secured to minorities under Section 2 is the right to have "their interests...represented in governmental decisions." Concurring Opinion at 45. In this way, the concurrence bolsters its argument that creating smaller districts in multi-seat counties would create a perverse result by lessening "minority influence" over the decisions reached in lawsuits. Going further afield, the concurrence expresses concerned that under a system such as that authorized in the district court's interim plan, there is a high probability that a minority voter appearing in court will have his or her case heard by a judge whom he or she had no hand in electing.

The concurrence's discussion approaches the perceived problem from the wrong end;[13] again, quite simply, the focus should be on the rights of the *voter*, not the litigant. The essential inquiry is whether the minority *vote* is diluted--whether minority citizens have an equal chance of electing candidates of their choice. As the concurrence acknowledges, the standard is whether the political processes are equally open to participation. The focus of the 1982 legislative history of the Act, the 1985 amendment, and *Gingles* is on electoral opportunities and success.

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[13] Congress has acknowledged that, depending on whether the right or the wrong question is posed, courts may reach a conclusion which is totally anathema to the intent of the legislature. *See, e.g.*, S. Rep. at 28 (discussing the "wrong test" imposed by the intent test). The concurring opinion's rear-ended approach can best be illustrated through the use of another question: Does the Act guarantee that minority interests are represented or that minorities have access to the political process? While it is undoubtedly presumed that an elected official will represent the desires of the voters, the Voting Rights Act does not speak to such a presumption. While it may seem that the two questions are simply different sides of the same coin, the distinction is one which the legislature has contemplated. If the concurrence's statement that the "right secured to minorities under Section 2 of the Voting Rights Act to not have their vote diluted is expressed in the assertion that their interests are to be represented in governmental decisions" were correct, this would lead to the absurd conclusion that a plaintiff could, pursuant to the Voting Rights Act, bring to task an elected official who has not, during his tenure in office, given proper deference to minority interests.

The concurrence refuses to acknowledge the preeminence, within the context of the Voting Rights Act, of the efficacy of the minority vote. The concurrence notes that, because all registered voters in the county vote for all the judges, "minority voters have some influence on the election of each judge." Concurring Opinion at 42. This statement entirely avoids the issue: the instant case is before this Court because minority voters have asserted and proven that any influence they may potentially have as a cohesive voice--whether as to the election of one judge or several--is submerged at the ballot box by white bloc voting.

Even more disturbing, however, is the concurrence's confusion of the minority *as voter* and the minority *as litigant*. This confusion is best illustrated by the concurrence's concern that, under a single member districting scheme such as that imposed by the federal district court's interim plan, "a minority member would have an 84.75% chance of appearing before a judge who has no

direct political interest in being responsive to minority concerns." *Id.* at 43. The right of minorities to an equal opportunity to elect the candidates of their choice encompasses more far-reaching effects than the statistical probability that a minority litigant will appear before a judge of like race or color.[14] Despite the progress achieved under federal and state civil rights statutes, minorities in this country are far from free of the lingering legacy of racial discrimination, even at the ballot box.

The Function of Function

When juxtaposed against the express language of the Act, a test which requires an examination of the function of the elected official is inherently suspect by virtue of its

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[14] Black and Hispanic judges serve as role models for other minority group members, who may not have envisioned a legal or judicial career as a real possibility in the past. In addition, minority electoral victories encourage other minority members to participate in the political process by voting and by running for office. Persistent minority defeat, on the other hand, leads to apathy among minority voters and a feeling of exclusion from the opportunity to join in the process of self-government. To assert that these interests are any less tangible because of the nature of the elected office is to pervert the very core of the Voting Rights Act.

obvious judicial invention. As one court has emphatically noted,

> [n]owhere in the 239 pages of the [Senate] Report is there any indication whatsoever that Congress intended the Voting Rights Act to apply to only particular types of elections. Rather, the entire Report indicates ... that the 1982 amendment was intended to effect an expansive application of the Act to state and local elections.

Southern Christian Leadership Conference v. Siegelman, 714 F. Supp. 511 (M.D. Ala. 1989). The title or duties of an elected office are inconsequential to the fundamental question of whether, due to significant white bloc voting, the votes of a cohesive minority group are consistently submerged and rendered ineffectual to elect the minority's preferred candidate.

The concurrence opines that "[f]unction is relevant to the threshold question of what features of the state arrangement define the office." Concurring Opinion at 41. This statement in its broadest sense is undoubtedly true. In the context of the Voting Rights Act, however, the compelling question is at what point that function will be

examined. The Act's focus on the minority voter reinforces the proposition that the function of the elected official is only relevant to an examination of whether, under the totality of the circumstances, a Section 2 violation has been established, not whether Section 2 is applicable.

To focus primarily on the function of the official during the initial analysis of a Voting Rights Act claim is to ignore the essential inquiry of the Act: "whether, as a result of the *challenged practice or structure*, the fundamental right of minorities to elect candidates of their choice and to participate equally in the political process has been violated." Senate Report at 28 (emphasis added). The quoted language indicates that, contrary to the concurring opinion's assertions, a reviewing court is not bound to accept a state's governmental plan if that plan in fact results in the illegal submergence of minority votes.[15] If deference to the

[15] In fact, the concurrence concedes that "section 2, if a violation is found, can lead to the dismantling of an entire system of voting practices that may have been in place for many years." Concurring Opinion at 30.

function of an official were in fact required, courts would have been acting contrary to the law since the very origin of voting rights litigation. Surely the imposition of single member districts in a judicial context treads no more upon a state's electoral scheme than the now familiar court-ordered displacement of well-entrenched at-large election schemes for legislative bodies.[16]

Vote Dilution and Single-Member Offices

The concurrence, characterizing Texas district court judges as single officeholders,[17] concludes that no violation

[16] The concurrence repeatedly argues that affording the minority plaintiffs relief in the instant case would totally dismantle the trial-level judicial system which Texas has chosen to implement. The torch has already destroyed this straw man; as the concurrence has pointed out, Texas has structured its government such that elected trial judges often wield their power independently. Even if single member districting should be the remedy ultimately imposed in the instant case, this fundamental characterization would not be altered.

[17] A court reviewing a claim of vote dilution must look to the plaintiffs and whether their votes, although cast, are impotent. The plaintiffs' success depends on an adequate demonstration of vote dilution. This task may be impossible where there is only one office at issue in the relevant jurisdiction because the election of an official to such an office, with unique responsibilities over a discrete geographical area, is unlikely to have dilutive potential. In short, no divisible alternative can be made. In the instant case, however, several similar, if not identical, positions are sprinkled throughout a relevant geographic area, presenting the likely potential for vote dilution.

of Section 2(b) can be shown because "each judge holds a complete judicial office," and there can be no share of such a single-member office. Concurring Opinion at 33. This application of the so-called "single officeholder exception" is entirely without support.

The concurrence relies primarily on the Second Circuit's opinion in *Butts v. City of New York*, 779 F.2d 141 (2d Cir. 1985), which examined New York's primary run-off election law. The contested New York law provided that if no candidate for mayor, city council president, or comptroller received more than forty percent of the vote in a party primary, then a run-off election is held between the two candidates receiving the most votes. The district court, concluding that the totality of the circumstances demonstrated

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The concurring opinion reaches the tenuous conclusion that Congress intended Section 2 to prohibit the discriminatory dilution of minority voting strength when minorities are attempting to elect appellate court judges, but that Section 2(b) can never reach the at-large elections of trial judges--regardless of whether one or one hundred judges are elected from the same district--because the latter officials decide controversies independently. There is no support for this contention in the words of the Act, in the legislative history of Section 2, nor in logic for this result-oriented contrivance.

a Section 2 violation, found in favor of the minority plaintiffs. The Second Circuit reversed, noting that

> [t]he concept of a class's impaired opportunity for equal representation [cannot be]...uncritically transfer[red] from the context of elections for multi-member bodies to that of elections for single-member offices....[T]here is no such thing as a "share" of a single-member office.

Butts, 779 F.2d at 148. The concurring opinion rests squarely--and solely--on this brief passage from *Butts*; examination of the particular facts in *Butts*, however, reveals that this passage provides absolutely no support for the concurrence.

In *Butts*, the voting district consisted of a municipality. From this voting district, three positions were filled by election. The three positions were the offices of (1) mayor, (2) city council president, and (3) comptroller. Concluding that it is impossible to capture a "share" of a single member office, the Second Circuit held that the contested electoral law did not trigger a vote dilution analysis and therefore

could not violate Section 2(b).[18] The instant case, on the other hand, involves the election of *multiple* judges to virtually identical positions in one geographic area, with each judge exercising autonomy over his or her particular office. The concurrence incorrectly extends *Butts*' reasoning to conclude that if minority groups are unable to elect their preferred candidate to these autonomous positions, the result is simply a consequence of the political process and not the

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[18] The *Butts* rule that a single-member office is not physically divisible has been implicitly rejected in *Carrollton Branch of NAACP v. Stallings*, 829 F.2d 1547 (11th Cir. 1987), *cert. denied sub nom. Duncan v. Carrollton*, 485 U.S. 936 (1988). In *Stallings*, plaintiffs challenged the one-person form of county commission government in Carroll County, Georgia, because it diluted minority voting strength and lessened the opportunity of black persons in the county to participate in the electoral process. This one-person system had been in effect since 1953. The Eleventh Circuit reversed the judgment in favor of the defendants, holding that the district court had applied the incorrect legal standard (in light of *Gingles*) by failing to give the proper weight to the two most important factors in a Section 2 vote dilution claim: (1) the extent to which minorities had been elected, and (2) the existence of racially polarized voting. *Id.* at 1555.
In its brief discussion of *Stallings*, the concurrence mischaracterizes the Eleventh Circuit's analysis, implying that the reversal turned only on the presence of evidence indicating a discriminatory intent. In fact, the Eleventh Circuit devoted most of its discussion to an analysis of the "effects" test of Section 2 and *Gingles*, and to the district court's findings as to whether the single-member scheme resulted in discriminatory vote dilution. The Eleventh Circuit reversed the district court's judgment based both on its treatment of the plaintiffs' constitutional challenge, and on its treatment of the Section 2 challenge as well.

result of vote dilution.

Butts stands for nothing more than the unremarkable proposition that in certain electoral situations, there exists only one relevant office for the whole electorate. In *Butts*, one of the offices at issue was the position of mayor. The Second Circuit reasoned that unlike the electorate which selects candidates to fill the legislature, the electorate which selects a candidate to fill the mayoralty cannot be subdivided into districts. In holding that a mayoral election cannot be the basis of a vote dilution claim, *Butts* thus focuses on the *electorate* and whether the *electorate* can be subdivided; it does *not* focus on the official and whether the official or his office can be subdivided.

On a cursory examination of the concurring opinion, its attempted expansion of the *Butts* rationale might seem plausible. This superficial plausibility, however, is what makes the concurring opinion so dangerous; it has the potential to seduce the unwary into an interpretation of the

Voting Rights Act that would frighteningly limit the applicability of the Act. The concurrence's understanding of the "single officeholder exception" is seriously flawed, and must not be allowed to do further damage.

In its broadest sense, the concurrence's conception of the "single officeholder exception" states absolutely nothing. *Every* officeholder is a single officeholder; *no* position is shared by more than one person. Every officeholder exercises complete authority over the duties of his or her office. To say that a district judge in Texas exercises full responsibility over his office simply does not advance the analysis. Every state legislator exercises full responsibility over his or her office; in that respect the legislator is no different from a judge. Every county sheriff exercises full responsibility over his or her office; in that respect the county sheriff is no different from a judge.

The problem with the concurrence's single officeholder analysis is that it misdirects the focus of the inquiry. The

question is not whether a *judge* can be subdivided, as the concurrence posits, but rather whether the *judiciary* can be subdivided, or more precisely, whether the electorate that selects the members of the judiciary can be fairly subdivided such that the votes of minority voters within the electorate are not submerged in a bloc of white votes. The focus must be on the electorate, and not on the individuals who are chosen by those voters.

Nonetheless, in an unprecedented example of judicial creativity, the concurrence attempts to expand the *Butts* rule by authorizing an examination of a trial court judge's role as a sole decisionmaker.[19] Such an expansion flies in the face

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[19] The concurrence heavily relies on its conclusion that the full authority of a trial judge's office is exercised exclusively by one individual. This conclusion is at odds with the true structure of the judicial system in Texas. For example, administrative matters are handled through a collegial decision-making process by the district judges within the county. Such matters include the election of a local administrative judge, the appointment of staff and support personnel, the adoption of local rules of administration, the adoption of local rules and the exercise of supervisory authority over the clerk's office. *See* Tex. Govt. Code Ann. § 74.091 *et seq.* (Vernon 1988). Furthermore, the judges, functioning together as a collegial body, are charged with the responsibility of selecting by majority vote a county auditor. *Id.* § 84.001 *et seq.* Moreover, the judges share authority over administration of the caseload. In Harris County, for example, fifty-nine district judges

of congressional intent that the Act liberally apply to all forms of voting. The concurrence does not do justice to the spirit of the Voting Rights Act by attempting to expand *Butts* to a situation in which several virtually identical positions are elected by the same electorate to serve the same geographic area.

Whether an office-holder wields his power in an individual or collegial manner is simply not the relevant inquiry. *Butts*, the case on which the concurrence hinges, was not based on a "collegial decisionmaking" rationale, nor was this concept even discussed. The *Butts* exception is premised simply on the number of officials being elected (one), the unique responsibilities of that office, and the

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have overlapping authority to handle the heavy caseload of the district. Similarly, jury selection, case assignment, and record retention are handled on a county-wide basis. Furthermore, cases can be freely transferred between judges and any judge can work on any part of a case including preliminary matters. One district judge may, therefore, find his or her hands tied -- or greatly assisted -- by an earlier order imposed by another court located in the county. Tex. R. Civ. P. 330(h). In light of this overlapping authority and responsibility, it is incongruous to suggest that district court judges do in fact exercise "full" authority over the office.

impediment to subdividing that single position so that minority voters have the opportunity to elect a "share." In the instant case, however, this Court is not concerned with the election of one single member position; rather, this Court is concerned with the election, within discrete geographic areas, of as many as fifty-nine judges with virtually identical functions. The instant case is unlike *Butts*; there is no physical impediment to elections from smaller representative areas.

One court has already specifically addressed the problem with which we are faced. In *Southern Christian Leadership Conference v. Siegelman*, 714 F. Supp. 511 (M.D. Ala. 1989), the court rejected the application of *Butts* to the election of several trial judges from a single county.[20]

> In effect, the at-large boundaries [in Butts]

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[20] The *Siegelman* court concluded, and I agree, that the courts in both *Butts* and *United States v. Dallas County Comm'n*, 850 F.2d 1433 (11th Cir. 1988) implicitly utilized the term "single-member office" to refer "to a situation where under no circumstances will there ever be more than one such position in a particular geographic voting area." *Siegelman*, 714 F. Supp at 518.

> coincide with the only "district" boundaries possible; because there is only one position to be filled, it becomes impossible to split up the jurisdiction any smaller. The concept of vote dilution is effectively rendered meaningless and such offices are inappropriate for section 2 vote dilution challenges. There is no such rationale, however, for not applying section 2 to elected positions merely because "the full authority of that office is exercised exclusively by one individual," as the defendants would have this court do.

Siegelman, 714 F. Supp. at 519-20 (footnotes omitted).

The approach in *Siegelman* is consistent with the Supreme Court's analysis in *Thornburg v. Gingles*, 478 U.S. 30 (1986). In *Gingles*, the Supreme Court stated that a threshold inquiry in a claim that an at-large election system dilutes minority voting strength is whether there is evidence that the minority group is sufficiently large and geographically compact to constitute a majority in a single-member district. "The single-member district is generally the appropriate standard against which to measure minority group potential to elect because it is the smallest political unit from which representatives are elected." *Gingles*, 478 U.S. at 40 n.17. Proof of this geographically compact

minority population essentially isolates the at-large electoral structure as the feature which has the potential to deny the minority fair electoral access. The maintenance of an at-large election scheme is not dilutive, however, where the electoral scheme in the relevant jurisdiction is indivisible because there is only one position to be for the particular jurisdiction.

Applying this reasoning, I continue to urge the adoption of the *Siegelman* court's definition of single member office:

> The *true* hallmark of a single-member office is that only one position is being filled for an entire geographic area, and the jurisdiction can therefore be divided no smaller. While mayors and sheriffs do indeed "hold single-person offices in Alabama," they do so because there is only one such position for the entire geographic area in which they run for election. ... It is irrelevant, in ascertaining the potential existence of vote-dilution, that these officials happen to exercise the full authority of their offices alone.

Siegelman, 714 F. Supp. at 518 n. 19 (emphasis original).

The *Siegelman* court is not alone in its approach to a claim of vote dilution. Several courts have found Section 2 violations in cases arising from similar factual situations.

For example, in *Clark v. Edwards*, 725 F. Supp. 285 (M.D. La. 1988), the district court assumed that districts with more than one judicial position were properly characterized as multi-member districts. Similarly, in *Haith v. Martin*, the district court concluded that because North Carolina Superior Court judgeships are "designated seats in multi-member districts, ... they are subject to section 5 preclearance requirements." 618 F. Supp. 410. Quoting the language of Section 2, the *Haith* court stated that "the Act applies to all voting without any limitation as to who, or what, is the object of the vote." *Id.* at 413. *See also Martin v. Allain*, 658 F. Supp. 1183 (S.D. Miss. 1987); *Williams v. State Board of Elections*, 696 F. Supp. 1563 (N.D. Ill. 1988).

The concurrence, noting that *Haith*'s focus was preclearance under Section 5 and not the merits of a vote dilution claim under Section 2, discounts this reference to the designation of trial judges as part of a multi-member body. Yet, even while urging that *Haith* is irrelevant to the instant

case because it involves Section 5 preclearance, the concurrence notes that there is no reason to distinguish between Section 5 and Section 2 with "respect to their applicability to judicial elections." Concurring Opinion at 28. The concurrence's conclusion is based on the realization that

> [t]o hold otherwise would lead to the incongruous result that if a jurisdiction had a discriminatory voting procedure in place with respect to judicial elections it could not be challenged, but if the state sought to introduce that very procedure as a change from existing procedures, it would be subject to Section 5 preclearance and could not be implemented.

Id. The concurrence, while clearly acknowledging the interlocking nature of Section 2 and Section 5, simply exempts from its reasoning those judges who are said not to act collegially; the concurrence's logic is strained and internally inconsistent.

A violation of the Voting Rights Act occurs where the challenged system effectively discourages equal participation in the electoral process and lessens the opportunity of

minority voters to elect representatives of their choice. Where several officials, performing essentially the same job, are elected at-large from one geographic area, the potential for vote dilution is no less tangible simply because each official acts independently of the others. As the court in *Siegelman* stated, there exists "no rational reason why the concept of vote dilution cannot, or should not, apply to elected members of the judiciary simply because judges exercise their authority in solitude." 714 F. Supp. at 520.

The concurrence attempts to shore up its argument that there can be no dilution of votes for the district judge positions in the instant case by asserting that the independent nature of the trial judge is integral to the linking of jurisdiction and elective base. The concurrence argues that

> Texas has structured its government such that it wields judicial power at the trial level through trial judges acting separately, with a coterminous or linked electoral and jurisdictional base, each exercising the sum of judicial power at that level, and all with review by courts acting collegially. We are persuaded that, because the fact and appearance of independence and fairness are so central to the judicial task, a state may

> structure its judicial offices to assure their presence when the means chosen are undeniably directly tailored to the objective. The choice of means by Texas here -- tying elective base and jurisdiction -- define the very manner by which Texas' judicial services are delivered at the trial court level. They define the office. Nothing in the Voting Rights Act grants federal courts the power to tamper with these choices.

Concurring Opinion at 31-32. Essentially, the concurrence argues that the union of elective base and jurisdiction defines the *very nature* of the Texas district judge position. Having posited the Texas office of district judge, the concurrence concludes that there is "compelling necessity sufficient to overcome the strict scrutiny of state acts impinging upon a fundamental interest." *Id.* at 32. The concurrence's assertions, however, are contrary to the realities of the Texas system. Any modification in the elective base of a judicial district will not destroy *the essence* of the district judge position any more than have the persistent modifications in the jurisdiction of Texas district courts. It is inconceivable that the remedial imposition of a non-dilutive electoral scheme would have a more than negligible effect on the

method by which judges exercise their authority. The concurrence cites no evidence--because there is none--that the *very nature* of the judicial office will be irreparably damaged by a modification in the elective base. In the absence of such evidence, it can hardly be said that the continued unmodified union of elective base and jurisdiction is a "compelling" state interest which militates against the application of the Voting Rights Act.

Undeterred by the obvious irrelevance of the acclaimed union between elective base and jurisdiction, the concurrence urges an additional state interest against the application of the Voting Rights Act--the appearance of judicial impartiality. The concurrence argues that the appearance of impartiality is a *defining element* of Texas' district judgeships. Again, the concurrence's attempts to manufacture a "compelling" state interest belie its desperation to achieve a result that would not require the displacement of the present electoral scheme. The fact that

Texas currently elects judges from county-wide areas in order to promote the appearance of impartiality speaks to the state's interest in retaining the current system; it does not speak to the *very definition* of the official post. The interest in retaining an appearance of impartiality is a factor which may be considered when, pursuant to *Gingles*, the totality of the circumstances are examined to determine if a Section 2 violation exists. However, this factor--the appearance of impartiality--is *absolutely irrelevant to the preliminary question of the applicability of Section 2.*

The instant case reveals an electoral scheme which is "discriminatory but corrigible."[21] Each county elects three to fifty-nine district court judges. In each county, all judges have the same authority and exercise the same responsibility. With the exception of specialty courts, all judgeships are essentially fungible; within each specialty, the judgeships are

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[21] While creating smaller districts exists as a potential means to remedy impermissible vote dilution, it is not an exclusive remedy. A legislature is at liberty to implement any electoral system which will alleviate vote dilution.

also fungible. Section 2 requires that once correctable vote dilution has been established, it must be eradicated by the implementation of a plan which will "completely remedy"[22] the violation by "fully provid[ing an] equal opportunity for minority citizens to participate and to elect candidates of their choice." S. Rep. at 31.

The State's Interest in Retaining the Current System

The defendants argue that elections for trial judges present strong state interests in retaining an at-large election system. Even if this contention has merit, the State's asserted interests are relevant only to the inquiries of whether plaintiffs have proven a Section 2 violation under the totality of the circumstances and, if so, what remedy would be most appropriate to alleviate the dilution of minority voting strength, while intruding on state interests only to the extent necessary to accomplish the task.

In *Zimmer v. McKeithen*, 485 F.2d 1297 (5th Cir. 1973)

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[22] *Dillard*, 831 F.2d at 252.

(en banc), *aff'd sub nom. East Carroll Parish School Board v. Marshall*, 424 U.S. 636 (1976) (per curiam), this Court set forth a non-exclusive list of factors to be examined when applying the totality of the circumstances test.[23] In *Gingles*, the Supreme Court reaffirmed the totality of the circumstances approach to a vote dilution claim. In doing so, the Supreme Court noted that the "factors were derived from the analytical framework of *White v. Regester* ... as refined and developed by the lower courts, in particular by the Fifth Circuit in *Zimmer*...." *Gingles*, 478 U.S. at 36 n.4 (citations omitted). The Supreme Court went further than the mere application of the totality test, however, and established a three-part foundation for the proof of a Section

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[23] The factors include (1) the history of discrimination in the state; (2) the extent to which voting is polarized by race; (3) the existence of practices or procedures which enhance the opportunity for discrimination; (4) whether minority groups have been denied access to a candidate slating process; (5) the existence and extent of any socio-political vestiges of discrimination; (6) whether political races are characterized by overt or covert racial appeals; and (7) the extent to which minority groups have been elected in the jurisdiction. In addition, the legislative history of the Act instructs that an inquiry into the responsiveness of the elected officials to minority needs and the legitimacy of the state's asserted reasons for maintaining the existing system may provide additional insight.

2 vote dilution claim. The minority group must demonstrate first that it is sufficiently large and geographically compact to constitute a majority in a single-member district; second, that the minority is politically cohesive; third, that the majority votes sufficiently as a bloc to usually defeat the minority's preferred candidate. *Id.* at 50-51.[24] Once the plaintiffs have satisfied these three threshold requirements, as they did here, the district court proceeds to the totality of the circumstances inquiry.

The concurrence in the instant case, however, totally ignores the plaintiffs' successful compliance with the *Gingles* three-part foundation showing. It is by this ruse that the concurrence never reaches the federal district court's treatment of the vote dilution factors based on its *per se* exclusion of at-large elections for trial judges from the scope

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[24] Unless these threshold *Gingles* factors are established, "the use of multimember districts generally will not impede the ability of minority voters to elect representatives of their choice." *Gingles*, 478 U.S. at 48.

of Section 2(b).[25] It must now be apparent that the concurrence's fundamental basis for denying minority groups the opportunity to challenge their exclusion from the process of judicial self-government is simply that the concurrence finds the concept of subdistricting unappealing as a proposed remedy. The only legitimate point at which to weigh this factor, however, is at the proof and remedy stages, when the countervailing factors of voting discrimination, as initially

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[25] In holding that the current at-large scheme for electing Texas district court judges violates Section 2, the federal district court made numerous specific factual findings regarding the *Gingles* threshold factors as well as the Senate Report, or *Zimmer*, factors. For purposes of this dissent, it need not be decided whether the district court correctly determined these factual issues. It should be noted and flagged at this point, however, that the trial record is replete with evidence of an inescapable reality: minorities in the challenged Texas districts are seldom ever--indeed, are only with great rarity--able to elect minority candidates to any of the at-large district court judge positions available in the districts.

It is necessary to indicate that this writer would not affirm the interim remedial portion of the district court's order in toto. Specifically, I am constrained to conclude that the district court acted beyond the scope of its remedial powers by ordering that judicial elections be nonpartisan. The district court's order fails to defer to a political choice of the State of Texas, a choice which was not even challenged by the plaintiffs in the instant case. The district court gave no explanation for rejecting the system of partisan elections. No evidentiary hearing was held on the issue, and no factual findings were made. The equity powers of the district court neither encompass nor justify the federal district court's actions; the district court should have deferred to the State's policy choice for partisan elections as expressed in its statutory scheme.

determined by the district court -- including, in particular, the plaintiffs' inability to elect their preferred candidates -- may be fully taken into balance..

Similarly, the State's interest in retaining an at-large election scheme is a factor to be weighed by a court applying the totality test only after the existence of the threshold *Gingles* factors has been determined.[26] In the instant case, the State has not articulated so compelling an interest in retaining the existing electoral scheme that the dilution of minority votes should go unremedied.[27]

When assessing the point at which a state's articulated interest in retaining the current at-large scheme should be considered, the Supreme Court's acknowledgment that the

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[26] The current administration endorses this approach. In an amicus brief filed in the instant case, the United States has argued that the proper approach is to consider, first, whether plaintiffs have met the three-part test outlined in *Gingles*. Assuming that this has been done, it is then appropriate to consider other factors set out in *Gingles*, and to weigh in particular the importance of the state's interest in the electoral system under attack.

United States Brief at 13.

[27] No opinion is expressed whether such a situation may ever be demonstrated.

Senate factors are secondary considerations, behind the three-part *Gingles* test, is of particular relevance.[28] Specifically, the Supreme Court noted that, while the Senate Report factors "may be relevant to a claim of vote dilution through submergence in multimember districts, unless there is a conjunction of the [three threshold factors], the use of multimember districts generally will not impede the ability of minority voters to elect representatives of their choice." *Gingles*, 478 U.S. at 48. From this language, it is beyond dispute that the Supreme Court has articulated a legal test for vote dilution claims which anticipates a threshold showing only of geographical compactness, political cohesion, and

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[28] The concurrence, by treating considerations such as the appearance of impartiality and venue rules as definitive elements of the relevant elected post, has avoided the need to analyze at what point a state's asserted interest in retaining the existing scheme should be considered. As has already been discussed in footnote 16, these considerations are not part and parcel of the trial judge post.
What the concurrence has done, instead of examining the State's interest in retaining the existing scheme, is to consider the State's interest in *not implementing* a voting scheme similar to that imposed under the interim plan (subdistricting) in order to alleviate any potential vote dilution. This approach positions the remedy squarely in a place of incorrect prominence and foregoes any serious inquiry into the existence of impermissible vote dilution. Stated simply, the concurrence has placed the cart before the horse.

white bloc voting sufficient usually to prevent election of the minority's preferred candidate.[29]

The conclusion that a state's interest is properly considered in the second phase of the *Gingles* analysis is bolstered by the Senate Report's indication that the list "of typical factors is neither comprehensive nor exclusive. While the enumerated factors will often be pertinent to certain types of § 2 violations, particularly to vote dilution claims, other factors may also be relevant and may be considered." *Id.* at 45 (footnote omitted). The Report stresses that no particular factors need be proved and neither the existence nor the non-existence of a majority of factors dictate the outcome. Rather, the determination of whether the political processes are equally open depends on an evaluation of the relevant political process. It is during this

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[29] By articulating a threshold test which examines three characteristics of the minority group and its voting patterns, the Supreme Court has implicitly stressed the proposition that the Voting Rights Act is primarily concerned with the efficacy of the minority vote and not with the function or characteristics of the elected post.

examination of minority access to the relevant jurisdiction's political process that a state's interest in retaining the existing system is particularly relevant.

Congress most certainly did not intend to frustrate the important state interest in a fair and impartial judiciary; at the same time, however, Congress expressed the affirmative intent to replace unlawfully dilutive electoral systems with ones in which minorities would have a full and fair opportunity to participate. In enacting Section 2(b) of the Voting Rights Act in 1982, it is clear that Congress was continuing the struggle to make the Act responsive to the needs and aspirations of the nation--to make absolutely certain that the fundamental right of minorities to cast an effective vote for candidates of their choice was not abridged.

For these reasons, it is imperative that a court first proceed to determine whether the *Gingles* three-part test has been met; only then should a court proceed to consider,

under the "totality of the circumstances," other relevant factors,[30] including the state interest in maintaining an at-large election system, to determine whether, on balance, the plaintiffs have proved a Section 2 violation.[31]

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[30] For example, one of the two "[a]dditional factors that in some cases have had probative value" in the Senate Report's illustrative list of totality of the circumstances factors is "whether the policy underlying the state or political subdivision's use of such voting qualification, prerequisite to voting, or standard, practice or procedure is tenuous." S. Rep. No. 417, 97th Cong., 2d Sess. 29, reprinted in 1982 U.S. Code Cong. & Admin. News 177, 207. In the proceedings below, the district court considered this factor at the appropriate point -- during a trial on the merits. The district court was not persuaded by defendants' defense that at-large elections served a critical state interest. The court determined that "[w]hile the Court does not find that the present system is maintained on a tenuous basis as a pretext for discrimination, the Court is not persuaded that the reasons offered for its continuation are compelling." District Court Opinion at 77.

[31] Because of my view that the State has not articulated a substantial interest in retaining the existing at-large system of electing district judges, the question of how much weight this factor should be afforded is not addressed. As the Supreme Court has indicated, "recognizing that some Senate Report factors are more important to multimember district vote dilution claims than others ... effectuates the intent of Congress." *Gingles*, 478 U.S. at 49 n. 15. It is my firm believe, however, that under no circumstances should the State's interest outweigh the following factors: the extent to which minority group members have been elected to office in the jurisdiction and the extent to which voting in the elections of the jurisdiction has been racially polarized. This belief is based on my acknowledgement of the Supreme Court's indication that "[u]nder a 'functional' view of the political process mandated by § 2 ... the most important Senate Report factors bearing on § 2 challenges to multimember districts are [these factors.]" *Id.* Additionally, placing greater weight on the factors which examine minority success at the polls and racial voting patterns furthers the purpose of the Act to "correct an active history of discrimination ...[and] deal with the accumulation of discrimination." S. Rep. at 5.

In the instant case, the State asserts the following interests as justification for retaining its dilutive electoral system: (1) ensuring popular accountability by making judges' jurisdiction coterminous with the electoral boundaries; (2) avoiding bias caused by small electoral districts; and (3) preserving the administrative advantages of at-large elections, including the use of specialized courts. The concurrence would not only accept the existence of these interests, but would characterize them as compelling.

Accountability: The State has advanced the argument that at-large elections provide greater accountability of the judge to county voters. The Chief Justice of the Texas Supreme Court testified that judges are "accountable to those people who can be hailed [sic] into their court," because people who feel they have been wronged by a particular judge may vote against that judge in the next election. Ostensibly, the district court's interim plan eliminates

effective accountability. The concurrence notes that under the district court's interim plan, for example, a minority litigant has "a 98.3% chance of appearing before a judge in whose election he had not been able to vote." Concurring Opinion at 44.

The concurrence's argument that judges must be "accountable" to potential *litigants* is an affront to the judiciary of the State of Texas. An honorable judiciary separated from the influence of others is "*indispensable* to justice in our society." Canon 1 of the Texas Code of Judicial Conduct (emphasis added). District judges are charged to apply the law, not respond to the expectations of litigants. To say that a district judge must be accountable to litigants is to suggest the unthinkable of great numbers of highly respected, dedicated public servants. Not only is such a suggestion misleading to a public already mystified by the bench and bar, it is offensive to those who have occupied distinguished positions as Texas state district judges in the

past, as well as those who now occupy such positions.

Even if "accountability" were a legitimate state interest, it is not a compelling reason to justify the current dilutive system. Under the existing system, it is highly probable that a case will be heard outside the county in which a litigant lives. In such a case, at least one--and probably both--of the parties will be appearing before a judge who was elected by a population which does not include that litigant. The argument that judges must remain "accountable" to potential litigants in their courts (nauseous as this straw man specter may be) pales in light of the current Texas venue rules, which frequently require that an out of county resident appear before a judge for whom the litigant neither cast a vote for nor against. Even further, in Texas, parties can agree to give a district court venue over a case not arising in the county. *Nipper v. U-Haul Co.*, 516 S.W.2d 467 (Tex. Civ. App.--Beaumont 1974, no writ).

The concurrence argues that Texas' elaborate system of

venue rules supports the argument that the State has demonstrated a concern for inter-county bias. However, any interest in ensuring accountability and the appearance of impartiality which may be suggested by the Texas venue scheme is lessened considerably by Texas' characterization of venue challenges as dilatory pleas which, if not raised initially, are waived. In light of such a practice, the state interest cannot be said to be compelling.

Aside from the complexities of the Texas venue rules, there are many other occasions when a party may appear before a judge elected by the residents of another county. For example, district court judges are frequently called into other counties to help with docket control. Despite the fact that the county's residents have no recourse against this out-of-county judge at the ballot box, Texas courts have upheld the constitutionality of this practice. *See, e.g., Reed v. State*, 500 S.W.2d 137 (Tex. Crim. App. 1973). Nor is the practice of electing judges from subdistricts without

precedent in the state. Texas Justice of the Peace courts, lower level trial courts with jurisdiction over an entire county, are elected from sub-county precincts.[32] Thus, a litigant often may appear before a justice of the peace who lives in the same county as the litigant, but not the same judicial district.

Additionally, Texas authorizes the use of retired or senior state district judges, who wield all the powers of their elected and active peers. Such a judge was, of course, at one time elected to that office. Upon retirement, however, that judge while sitting is vested with the complete authority of the office and is not subject to election or reelection. Simply stated, Texas' retired or senior judges contribute

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[32] In *Martin v. Allain*, 658 F. Supp. 1183, 1195-96 (S.D. Miss. 1987), the court adopted a single-member district remedy for some Mississippi trial judges who were elected at-large in racially dilutive elections, after finding that Mississippi already elected some other judges from areas smaller than the court's jurisdiction. The court there stated:

> Although the state has adopted the policy of the post system of electing judges in multi-member judicial districts above the justice court level, it long ago adopted the policy of single-member electoral districts for justice court judges. The state also has the policy of judges deciding cases which may originate outside their election districts.

greatly to the reduction of court dockets, but they are no longer accountable in any fashion to the electorate. *See* Tex. Gov't Code Ann. §§ 75.001 - .002 (Vernon 1988).

There seems to be no basis in fact for the State's contention that county-wide accountability is essential to the proper selection of district judges, or that any measure of electoral accountability is significantly defeated by dividing the county into smaller electoral districts.

A Fair and Impartial Judiciary: Both the State and intervenors put on witnesses who testified that the creation of subdistricts was inadvisable because it could lead to perceptions of judicial bias and undue influence by special interests. Specifically, the witnesses testified that judges elected from smaller districts would be more susceptible to undue influence by organized crime or to pressure by other political sources including special interest groups.

The concurrence accepts this argument, and urges in addition that subdistricting "would change the structure of

the government because it would change the nature of the decision-making body and diminish the appearance if not the fact of judicial independence."[33] Concurring Opinion at 44. The concern that a judge elected from a small electorate is more susceptible to improper pressure, however, has not prevented or impeded Texas from creating judgeships in counties with relatively small populations. Texas has 386 district judges. A significant number of these judges are elected from districts of less than 100,000 people; indeed, in some districts, as few as 24,000 to 50,000 people constitute the relevant electorate. Even if Harris County (with a population of 2.5 million people) were divided into as many as fifty-nine subdistricts (the number of district courts of general and special jurisdiction), each district would contain

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[33] Once again, the concurrence's asserted concern is premised on the anticipated remedy -- subdistricting. While the Supreme Court, in *Gingles*, did indicate that a "single-member district is generally the appropriate standard against which to measure minority group potential to elect," it did not mandate the imposition of subdistricts to remedy every instance of illegal vote dilution. The concurrence, by erroneously factoring in, at the liability phase, concerns which may never be borne out, refuses to properly acknowledge the intent of the Voting Rights Act.

approximately 41,000 people. If Dallas County were divided into thirty-seven subdistricts, each subdistrict would have approximately 42,000 people. In short, even if judicial districts in large counties were subdivided, the resulting subdistricts are unlikely to be smaller than many existing judicial districts in Texas. Consequently, the ostensible state interest against a small electorate in judicial districts has not been shown.

Furthermore, Texas law does not reflect the witnesses' fear that subcounty districts are inconsistent with the existence of a fair and impartial judiciary. Justices of the Peace are already elected from areas smaller than a county; in a very extended number of counties, these districts contain smaller populations than the hypothetical subdistricts of Dallas and Harris counties discussed above. For example, the Texas Constitution permits counties with as few as 18,000 people to be divided into four justice of the peace precincts. Tex. Const. art. 5, § 18(a).

The foregoing is sufficient to demonstrate the state has no compelling interest in retaining county-wide elections. Even if it were not, it is plainly dispositive that the Texas Constitution was recently amended to give voters the option of electing district judges from subdistricts. *See* Tex. Const. art. 5, § 7a(i). That no county has yet to implement such an elective scheme does not alter the reality that such a change already has the blessing of the state legislature. In light of this constitutionally authorized electoral scheme, the State cannot now say that it has a compelling interest in *not* electing district judges from an area smaller than a county.

Considering the precedent for the creation of judicial subdistricts, the size of the potential subdistricts, and the lack of any real indication that perceived impropriety would result,[34] the state's asserted interests do not support the continuation of its present dilutive electoral system.

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[34] It is also notable that one judge, an intervenor in the instant case, testified that he was not aware of any allegations of unfairness or suggestions that white litigants were not treated fairly by minority judges elected from subcounty Justice of the Peace precincts.

Administrative Advantages: The State has cited the administrative advantages of the present system, including the county-wide retention of records, the random assignment of cases to judges within the county and county-wide jury empaneling. There is no reason why an electoral scheme utilizing subdistricts cannot retain each and every one of these administrative features; any remedy which might be imposed in this case need not require that a judge elected from a subcounty area have jurisdiction only over that area. In fact, the interim plan fashioned by the district court in the instant case specifically retained all of the foregoing valid administrative features. Furthermore, even if retention of certain administrative conveniences were not possible under a remedial scheme, that fact cannot justify the continuation of an otherwise racially dilutive electoral process. *See Westwego Citizens for Better Gov't v. Westwego*, 872 F.2d 1201 (5th Cir. 1989).

The concurring opinion attempts to place great weight

on the interest of the State in retaining the system of "specialty" courts. But there is absolutely no reason why a remedy would be unable to accommodate this interest by retaining these courts of specialized jurisdiction.[35] Most counties which utilize the administrative convenience of specialty courts have several of each court; consequently, a remedy could be formulated which retains the use of such courts.[36] It cannot be gainsaid that the State has almost unlimited flexibility to devise a remedial plan which retains specialty courts and all of the other important government interests while eradicating the dilution of minority voting strength. It is critical that it be understood that the history, the intent, the text and spirit of the Voting Rights Act in general and Section 2 in particular mandates the

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[35] It should be noted that the Texas Constitution limits the State's interest in establishing specialty courts; the state supreme court has ruled that the legislature may not disturb state courts' jurisdiction.

[36] Because the district court, in its interim plan, indicated the belief that a remedy could be created which allows the substantial use of the Texas system of specialty courts, District Court Order at 7, this writing expresses no view on whether or not a state's interest would be substantially stronger if such a remedy could not be devised.

implementation of just such a remedial electoral scheme.

Summary: Taken together, the State's attempt to articulate its interest in retaining the current voting system pales when compared to the clear purpose of the Voting Rights Act. The State has not shown an inalterable policy of not subdividing districts, nor has it shown that judges would be less accountable to the electorate if elected from a subdistrict. Further, there is no indication that any impropriety, real or perceived, on the part of judges elected from smaller units would in fact occur. Finally, while the State may indeed have a legitimate interest in retaining specialty courts, the State has failed to demonstrate why that interest cannot be effectuated in an electoral scheme which does not dilute minority voting strength.

III.

CONCLUSION

"The Voting Rights Act was designed by Congress to banish the blight of racial discrimination in voting, which

has infected the electoral process in parts of our country for nearly a century."[37] It is my most earnest conviction that the majority and concurrence have each chosen erroneous methods to examine the particular specimen of vote dilution asserted by the plaintiffs and found by the district court here. The true method that both have missed has been obscured by their failure to recognize the true meaning of the Voting Rights Act, and by their failure to comply with the strictures of *Gingles*. The majority, abandoning established precedent, has determined that Section 2 of the Voting Rights Act does not apply to any judicial elections. The concurrence has looked to the *function* of the elected official, and the duties and powers of the official once in office, to conclude that, because trial judges act independently, at-large elections cannot result in minority vote dilution. There is simply no support in the words of the Act, in the legislative history of Section 2, nor in logic for either the majority or the

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[37] *South Carolina v. Katzenbach*, 383 U.S. 301, 308, 86 S.Ct. 803, 808, 15 L.Ed.2d 769 (1966).

concurrence's embrace of such result-oriented determinations.

The position of each Administration has been that the Voting Rights Act applies to judicial elections. The current Administration goes even further and strongly urges that Section 2(b) was violated by the electoral scheme that was utilized here to elect certain Texas district court judges.

The Voting Rights Act is in no way concerned with the names or positions listed on the ballot. The United States Congress, by enacting the Voting Rights Act, has instructed that this and every other court focus on the voter, particularly the minority voter, and the efficacy of each vote cast, so as to ensure that minorities are not denied an equal opportunity to participate effectively in the democratic process.

I respectfully dissent.

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
MIDLAND-ODESSA DIVISION

Filed November 08, 1989
CIVIL ACTION NO. MO-88-CA-154

LEAGUE OF UNITED LATIN AMERICAN CITIZENS (LULAC), COUNCIL #4434 et al.,

Plaintiffs,

AND
HOUSTON LAWYERS ASSOCIATION, et al.,

Plaintiff-Intervenors,

v.

JIM MATTOX, et al.,

State Defendants

AND
JUDGE SHAROLYN WOOD AND JUDGE F. HAROLD ENTZ.

MEMORANDUM OPINION AND ORDER

The above-captioned cause came on for trial before the Court on September 18, 1989. This suit was brought by named individual Plaintiffs and members of the League of United Latin American Citizens ("LULAC"), Council #4434, LULAC Council #4451 and LULAC Statewide. Plaintiffs are Mexican-American and Black citizens of the State of Texas. Plaintiffs seek (1) a Declaratory Judgment that the existing at large scheme of electing State District Judges in nine (9) target counties of the State of Texas violates Plaintiffs' civil rights by unconstitutionally diluting the voting strength of Mexican-American and Black electors in violation of Section 2 of the Voting Rights Act of 1965, as amended, 42 U.S.C. § 1973 (West Supp. 1989) ("Voting Rights Act")[1]; (2) a

[1] Section 2 provides in pertinent part:

> "(a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color ...
>
> "(b) A violation of subsection (a) of this section is established if, based upon the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity to participate in the political process and elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: Provided, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population."

(Emphasis in the original.)

permanent injunction prohibiting the calling, holding, supervising or certifying any future elections for District Judges under the present at large scheme in the target areas; (3) formation of a judicial districting scheme by which District Judges in the target areas are elected from districts which include single member districts; and (4) costs and attorneys' fees.

This case really had its beginning in 1965, when Congress passed the Voting Rights Act and it was signed by President Johnson. This Act, as everyone knows, had as its purpose "to rid the country of racial discriminating in voting."

The next chapter in the saga was the holding in *Chisom v. Edwards*, 839 F.2d 1056 (5th Cir. 1988), *cert. denied, sub nom, Chisom v. Edwards*, 109 S.Ct. 310 (1989) (*Chisom I*). In *Chisom I* Judge Johnson held: "Minorities may not be prevented from using Section 2 [of the Voting Rights Act] in their efforts to combat racial discrimination in the election of state judges; a contrary result would prohibit minorities from achieving an effective voice in choosing those individuals society elects to administer and interpret the law."

Having concluded, as will later be pointed out in formal Findings of Fact and Conclusions of Law, that there is racial discrimination in the election of state judges in some counties of the State of Texas, and the law plainly being that such discrimination is prohibited by the Voting Rights Act, this opinion should not come as any surprise to the attorneys or judges of this State.

Mr. Justice Holmes, in *Southern Pacific Co. v. Jensen*, 244 U.S. 205, 221, in dissenting, said:

> I recognize without hesitation that judges do and must legislate, but they can do so only interstitially; they are confined from molar to molecular motions.

This dissent has been on the books for 83 years and, while this Court recognizes that some judges may legislate, this Court is extremely reluctant to do so. Legislation should be done by legislators. This Court has determined that our current system, as it applies to some counties, violates Section 2 of the Voters Rights Act. Some fixing has to be done, because the current system is broken.

In writing this opinion, I am cognizant of the fact that our Texas Constitution will need to be amended. Legislators should seriously consider nonpartisan elections for District Judges. As Chief Judge Tom Phillips pointed out in his testimony, it really makes no sense that judges are selected because of their political affiliation. A judge should decide matters before him without regard to partisan politics. It speaks well of our current judiciary that our sitting judges

have been able to make decisions without regard to whether the judge is Republican or Democrat.

As long as judges, however, are selected on a partisan ballot, there will be some rancor and enmity between the successful and the unsuccessful candidate. The loser is going to have regrets by virtue of the fact that she or he did not secure enough votes in an election. It makes no sense to believe that a judge is selected because the top of the ticket is either weak or strong. This Court felt the animosity between certain judges in the courtroom. There is no need for this. Certainly judicial reform will not make all candidates live by the Golden Rule, but it is a step in the right direction. It was brought to the Court's attention that perhaps a majority of the voters in a General Election, and for that matter, in Primary Elections, have no idea of the qualification of a judge for whom they vote. Their vote is cast because a straight ticket is being cast, and a straight ticket includes judicial nominees from a particular political party.

If the Constitution is to be changed, would it not make sense to have judges elected when members of school boards or city councils are elected? These races are traditionally nonpartisan, and people going to the polls to vote for school trustees or mayors have for the most part some idea of the qualifications of the candidates. Judges could be selected at the same time in order to make sure that one was not getting votes simply because one is Democrat or Republican. Minority voters could go to the polls with their heads held high and with some realization that their preferred candidate either would be or could be elected.

Certainly, it is not Court's intention to tell the legislature how its job is to be accomplished. Single member districts may or may not be the answer if we are to continue to have partisan elections. There may be easier and better solutions that can evolve through the legislative process.

These are troubled waters. One hesitates to plunge into such waters, because our system of selecting judges has, for

the most part, served us well for many many years. Our Congress, however, in 1964, made changes. Our Courts have construed those changes, and it is now necessary to move forward so that minorities can realize the rights legally bestowed upon them, and which have, in the past, been denied.

THE PRESENT AT-LARGE SYSTEM

This litigation challenges the system of electing 172 District Court Judges at-large from areas composed of entire counties.[2]

The present system of electing District Court Judges in Texas requires that each judge be elected from a District no smaller than a county. Tex. Const. Art. 5 § 7a(i) (Vernon Supp. 1989).[3] Each Judge serves a term of four (4) years. Tex. Const. Art. 5 § 7 (Vernon Supp. 1989). Candidates for

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[2] The counties at issue are: Harris, Dallas, Tarrant, Bexar, Travis, Jefferson, Lubbock, Ector and Midland.

[3] This system is "at-large" because judges are elected from the entire county rather than from geographic subdistricts within the county.

District Judge must be citizens of the United States and the State of Texas, licensed to practice law in this State and a practicing lawyer or Judge of a Court in this State, or both combined for four years. *Id.* Candidates must have been a resident of that election district for at least two (2) years and reside in that district during his or her term of election. *Id.* District Court Judges must be nominated in a primary election by a majority of the votes cast. Tex. Election Code § 172.003 (Vernon 1986). Each candidate's political party is indicated on the election ballot. Judicial candidates are usually listed far down on an election ballot. They run for specifically numbered courts and must secure a plurality of the vote in the general election to win a judicial seat.

METHODOLOGY, DATA AND ELECTIONS ANALYZED

Statistical analysis is the common methodology employed and accepted to prove the existence of political cohesiveness and racial bloc voting necessary to establish a

voter dilution case.[4] Ecological regression analysis[5] and extreme case analysis[6] were the types of statistical analysis used by Plaintiffs' experts in the present case.[7]

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[4] In *Thornburg v. Gingles*, 479 U.S. 30, 106 S.Ct. 2752, 92 L.Ed.2d 25 (1986), Justice Brennan held that racial bloc voting can be established by a type of abstract statistical inquiry called "bivariate regression analysis." This analysis correlates the race of the voters and the level of support given to the candidate. *Id.* at 61. If a candidate is supported by a large proportion of the minority group yet does not win, the vote is declared to be racially polarized in a legally significant sense and racial bloc voting is taken to be established.

All variables beside race of the voters and support given the candidates that might also explain voters' choices are expressly excluded from consideration. In Justice Brennan's view, "[i]t is the difference between the choices made by [minorities] and whites - not the reasons for that difference - that results in [minorities] having less opportunity than whites to elect their preferred representatives." *Id.* at 63.

[5] Ecological regression analysis shows the relationship between the ethnic composition of voting precincts and voting behavior, i.e., which candidate receives how many votes from each race/ethnic group. This type of analysis incorporates the use of a coefficient of correlation or Pearson r, accompanied by an estimate of the statistical significance of r, the coefficient of determination and the regression line. *See Overton v. City of Austin*, 871 F.2d 529, 539 (5th Cir. 1989).

[6] Extreme case or homogenous precinct, analysis looks to homogenous precincts in which almost all of the people of voting age belong to one ethnic group. If race/ethnicity reflects voting behavior, then election results in predominately minority precincts should differ from results in predominately Anglo precincts.

[7] The majority which agreed with Justice Brennan that voter dilution was demonstrated by the impact or results of the *Zimmer* factors and the *Gingles* threshold analysis deserted him when he came to the proof of the second and third *Gingles* factors.

The data used by Plaintiffs to support their statistical analysis varied according to the type of information available to them since the 1980 Census. Plaintiffs used voting age population data by census tract to establish the *Gingles* 1 factor of size and geographic compactness. Plaintiffs used a variety of data sets to establish the *Gingles* 2 cohesiveness and Gingles 3 white bloc voting factors depending on information available in the County in question.

Justice White maintained that under Justice Brennan's test there is racially polarized voting whenever a majority of whites vote differently from a majority of blacks, regardless of the race of the candidates. *Gingles*, *supra*, at 83. To illustrate his disagreement, Justice White posited the hypothetical which assumed an eight-member multimember district that was 60% white and 40% black, the blacks being geographically located so that two safe black single-member districts could be drawn. Justice White further assumed that there were six white and two black Democrats running against six white and two black Republicans. Justice White wrote, "[u]nder Justice Brennan's test, there would be polarized voting and a likely § 2 violation if all the Republicans, including the two blacks, are elected, and 80% of the blacks in the predominately black areas vote Democratic." *Id.* at 83. Justice White concluded that such analysis was "interest-group politics rather than a rule hedging against racial discrimination." *Id.* at 83.

Justice O'Connor and the three other Justices for whom she wrote did not reject bivariate regression analysis solely to establish political cohesiveness and assess the minority groups prospects for electoral success. *Id.* at 100. However, Justice O'Connor did reject Justice Brennan's position that evidence that explains divergent racial voting patterns is irrelevant.

In Counties where Plaintiffs presented a case on behalf of Hispanics only, they relied on the percentage of Hispanic registered voters in voting precincts in any given year. These figures were based on Spanish surname counts done by the Secretary of State of Texas. In other instances, Plaintiffs used counts of Black and Hispanic totals or voting age population in each precinct of a particular county. When counts were not available, Plaintiffs based their analysis on 1980 census information. In some counties, precincts retained the same boundaries reported in the 1980 census. 1980 census data from precincts with unchanged boundaries were used in those counties. In several counties, Plaintiffs reconfigured precinct lines[8] and used demographic data from these newly created precincts. When relying on census data, Plaintiffs calculated the number of non-minorities within

[8] This process requires comparing new precinct maps with their new lines and census block maps that show racial composition of the blocks. This process is frequently used to update precinct data.

precincts by subtracting the number of Hispanics and Blacks from the total number of persons within the precinct.

Plaintiffs' experts only reviewed elections where a minority candidate opposed an Anglo. They preferred to analyze general elections, however primary elections were analyzed when no minority candidate made it past that stage of the electoral process.

The Supreme Court in *Thornburg v. Gingles*, *supra*, requires the analysis of several elections to determine if there is a pattern of voting related to race/ethnicity. In the present case, when there were District Court elections in a county in question in which a minority opposed an Anglo, Plaintiffs relied solely on analysis of District Court elections. In some Counties this included both general and primary elections. Where there were not enough such District Court elections other elections were analyzed. First, County Court elections in which minorities opposed Anglos were selected. Next, Plaintiffs turned to Justice of the Peace elections where the

election district was at least as large as a city within the county at issue. Finally, if no relevant local judicial races occurred, Plaintiffs analyzed statewide judicial elections. *See* Testimony of Dr. Robert Brischetto.

All jurisdictional prerequisites necessary to the maintenance of the claims of the parties have been fulfilled. After reviewing the testimony and exhibits introduced at trial, as well as the arguments and authorities of counsel, the Court hereby enters the following Findings of Fact and Conclusions of Law pursuant to Federal Rule of Civil Procedure 52.

FINDINGS OF FACT

INDIVIDUAL PLAINTIFFS

1. The names and counties of residence of the ten (10) named individual Plaintiffs are as follows: (a) Christina Moreno - Midland; (b) Aquilla Watson - Midland; (c) Joan Ervin - Lubbock; (d) Matthew W. Plummer, Sr. - Harris; (e) Jim Conley - Bexar; (f) Volma Overton - Travis; (g) Gene Collins - Ector; (h) Al Price - Jefferson; (i) Mary Ellen Hicks

- Tarrant; and (j) Rev. James Thomas - Galveston. Each named Plaintiff is a citizen of the United States registered and qualified to vote in District Court elections in Texas. Except for Christina Moreno, who is Hispanic, each named Plaintiff Black.

ORGANIZATIONAL PLAINTIFFS

2. Plaintiffs LULAC #4434 and LULAC #4451 are local chapters of the larger Statewide LULAC organization. Members of the LULAC Statewide organization reside in all of the counties challenged in this suit. Depo. of John Garcia. The organization is composed of both Mexican-American and Black residents of the State of Texas. The members of LULAC #4434 reside in Midland County. The members of LULAC #4451 reside in Ector County.

3. Plaintiff-Intervenor the Houston Lawyers Association ("HLA"), is an association of Black lawyers in Harris County. The participation of Plaintiff-Intervenor the

Texas Black Legislative Caucus ("TBLC") is limited to the remedy stage of this litigation.

DEFENDANTS & DEFENDANT-INTERVENORS

4. Defendants are sued in their official capacities only. Defendant Jim Mattox is the Attorney General of the State of Texas and charged with the responsibility of enforcing the laws of the State.

Defendant George Bayoud is Secretary of State of Texas. As such he functions as chief elections officer charged with administering the election laws of the State. Secretary Bayoud is substituted as a party in this litigation for former Secretary of State Jack Rains.

Defendants Thomas R. Phillips, Michael J. McCormick, Ron Chapman, Thomas J. Stovall, James F. Clawson, Jr., Joe E. Kelly, Robert M. Blackmon, Sam M. Paxson, Weldon Kirk, Jeff Walker, Ray D. Anderson,

Leonard Davis and Joe Spurlock, II are members of the Judicial Districts Board[9] created by Art. V. Section 7a of the Texas Constitution and Art. 24.911 *et seq.* of the Texas Government Code. The Judicial Districts Board is charged with reapportioning districts from which District Court Judges are elected.

Sitting District Court Judge Sharolyn Wood, 127th District Court, Harris County and Judge Harold Entz, Jr., 194th District Court, Dallas County Intervened in their individual capacities as Defendants.[10]

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[9] Several members of the Judicial Districts Board were replaced by new members during the interim of this litigation. Michael J. McCormick replaced John F. Onion, Robert M. Blackman replaced Joe B. Evans and Jeff Walker replaced Charles Murray.

[10] Thirteen District Court Judges from Travis County initially intervened as Defendants. The Court struck their intervention at their request.

GINGLES THRESHOLD ANALYSIS

Size and Geographic Compactness

5. Harris County. Harris County has the largest population among the nine target Counties in this case. Plaintiffs are proceeding only on behalf of Black voters in Harris County. With a total population of 2,409,544,[11] its Black population is 473,698 (19.7%). There are 1,685,024 people of voting age,[12] with 305,986 (18.2%) voting age Black residents of Harris County. Plaintiffs' Harris County ("H") Exhibit 01.

There are fifty nine (59) State District Courts in Harris County. Black residents are concentrated in the North Central, Central and South Central sections of Harris

[11] In each County, Plaintiffs rely upon the 1980 Census for total population of Blacks and Hispanics within the County.

[12] For all Counties in this case, Plaintiffs relied on a computer print out of voting age populations prepared by the Data Center at Texas A&M University directly from 1980 U.S. Census tapes.

County. H-04, p. 2, Map of Proposed Districts.[13] Evidence was introduced that nine (9) Black single member districts of greater than fifty percent (50%) Black voting age population were possible. Id. at 1; Plaintiff-Intervenor Harris County ("P-I H") Exhibits 2, 2a.

6. Dallas County. Dallas County is the second largest County involved in this case. Plaintiffs are proceeding only on behalf of Black voters in Dallas County. Dallas County has a total population of 1,556,549. Its Black population is 287,613 (18.5%). There are 1,106,757 people of voting age, with 180,294 (16%) voting age Black residents. Plaintiffs' Dallas County ("D") Exhibit 01.

[13] Plaintiffs drew districts in each County of approximately equal size based on the number of District Courts in the County. Plaintiffs calculated the size and number of precincts in each proposed district on the basis of both total population and voting age populations. This Court recognizes that the concept of "one man one vote" does not apply to the judicial elections. *Chisom I, supra*, at 1061. Accordingly, this Court's analysis rests upon Plaintiffs' calculation based upon voting age population. Plaintiffs drew each district on this basis under the assumption that each district should contain 1/n of the voting age population in the County, with n being the number of District Courts in the County. Plaintiffs' Post Trial Brief at 11.

There were thirty six (36) State District Courts in Dallas County at the time this case was filed. On September 1, 1989, the Texas Legislature created a thirty-seventh State Judicial District Court in Dallas County. Black residents are concentrated in the Central and South Central sections of Dallas County. D-04, p. 2, Map of Proposed Districts based on 36 District Courts. Evidence was introduced that seven (7) Black single member districts of greater than fifty percent (50%) Black voting age population were possible. *Id.* at 1, 3-9;[14] Plaintiff-Intervenor Dallas ("P-I D") Exhibits 34. Plaintiff-Intervenors' Exhibit 7 reflects that there are approximately 36 homogeneous precincts of 90% Black population.

7. Tarrant County. Plaintiffs are proceeding only on behalf of Black voters in Tarrant County. Tarrant County

[14] Proposed single member districts 1 & 3 barely meet the Overton majority -minority voting age population requirement. These proposed districts contain 51.33% and 52.05% black voting age population respectively.

has a total population of 860,880. The Black population of Tarrant County is 101,183 (11.8%). There are 613,698 people of voting age, with 63,851 (10.4%) voting age Black residents of Tarrant County. Plaintiffs' Tarrant County ("Ta") Exhibit 01.

There are twenty three (23) State District Courts in Tarrant County. Black residents are concentrated in the Center of the County. Ta-04, p. 2, Map of Proposed Districts. Evidence was introduced that two (2) Black single member districts of greater than fifty percent (50%) Black voting age population were possible. *Id.* at 1.

8. Bexar County. Plaintiffs are proceeding only on behalf of Hispanic voters in Bexar County. Bexar County has a total population of 988,800. Its Hispanic population is 460,911 (46.61%). There are 672,220 people of voting age with 278,577 (41.1%) voting age Hispanic residents of Bexar County. Plaintiffs' Bexar County ("B") Exhibit 01.

There are nineteen (19) State District Courts in Bexar County. Hispanic residents are concentrated in the Central and South Central sections of the County comprising most of the population of the City of San Antonio. B-04, p. 2, Map of Proposed Districts. Evidence was introduced that eight (8) Hispanic single member districts of greater than fifty percent (50%) Black voting age population were possible. *Id.* at 1.

9. Travis County. Plaintiffs are proceeding only on behalf of Hispanic voters in Travis County. With a total population of 419,335, its Hispanic population is 72,271 (17.2%). There are 312,392 people of voting age with 44,847 (14.4%) voting age Hispanic residents of Travis County. Plaintiffs' Travis County ("Tr") Exhibit 01.

There are thirteen (13) State District Courts in Travis County. The largest concentration of Hispanic residents in one area, if at all, appears to be located in the Eastern portion of the County. Tr-04, p. 2; Tr-05, p. 1, Map

of Proposed Districts. Mr. David Richards testified that in his opinion the Hispanic community was pretty well dispersed in Travis County. Nevertheless, evidence was introduced that one (1) combined minority single member district of greater than fifty percent (50%) Hispanic voting age population was possible. *Id.* at 1. Plaintiffs' Exhibit Tr-04 depicts the single member Hispanic district proposed for Travis County. The Court finds that it is without moment that the proposed district appears to be minimally contiguous.

10. Jefferson County. Plaintiffs are proceeding only on behalf of Black voters in Jefferson County. Jefferson County has a total population of 250,938. Its Black population is 70,810 (28.2%). There are 179,708 people of voting age of which there are 44,283 (24.6%) voting age Black residents of Jefferson County. Plaintiffs' Jefferson County ("J") Exhibit 01.

There are eight (8) State District Courts in Jefferson County. Black residents are concentrated in the

Central and South Eastern portions of Jefferson County. J-04, p. 2, Map of Proposed Districts. Evidence was introduced that two (2) Black single member districts of greater than fifty percent (50%) Black voting age population were possible. *Id.* at 1.

11. Lubbock County. Plaintiffs are proceeding on behalf of the combined Black and Hispanic voters in Lubbock County. There is a total population of 211,651 in Lubbock County. The Black population of Lubbock County is 15,780 (7.5%), while the Hispanic population is 41,428 (19.6%). There are 150,714 people of voting age, with 9,590 (6.4%) voting age Black residents and 22,934 (15.2%) voting age Hispanic residents. The combined minority voting age population is 32,524 (21.6%). Plaintiffs' Lubbock County ("L") Exhibit 01.

There are six (6) State District Courts in the Lubbock Crosby County area. The combined minority population is concentrated in the North Eastern, Eastern and

South Eastern sections of those Counties. L-04, p. 2, Map of Proposed Districts. Evidence was introduced that one (1) combined minority single member district of greater than fifty percent (50%) Black voting age population was possible. *Id.* at 1. This remains true when Plaintiffs controlled for voting age population of non-United States citizens of Spanish origin. Plaintiffs' Exhibit L-11.

12. Ector County. Plaintiffs are proceeding on behalf of combined Black and Hispanic voters in Ector County. The total population of Ector County is 115,374. Its Black population is 5,154 (4.5%) and the Hispanic population is 24,831 (21.5%). There are 79,516 people of voting age. The voting age population by minorities consists of 3,255 (4.1%) Black voters and 14,147 (17.8%) Hispanic voters for a combined minority voting age population of 17,402 (21.9%). Plaintiffs' Ector County ("E") Exhibit 01.

There are four (4) State District Courts in Ector County. Minority residents are concentrated in the Southwest

section of the County. E-04, p. 2, Map of Proposed Districts. Evidence was introduced that one (1) combined minority single member district of greater than fifty percent (50%) minority voting age population was possible. *Id.* at 1. It is possible to draw a district of combined minority population of voting age even if non-citizen voting age Hispanics are eliminated from the calculations. Plaintiffs' Exhibit E-13.

13. Midland County. Plaintiffs proceed on behalf of Black and Hispanic voters combined in Midland County. Midland County has a total population of 82,636. Its Black population is 7,119 (8.6%) and its Hispanic population is 12,323 (14.9%). There are 57,789 people of voting age, 4,484 (7.8%) voting age Black voters and 6,893 (11.9%) voting age Hispanic voters. The combined voting age population is 11,377 (19.7%). Plaintiffs' Midland County ("M") Exhibit 01.

There are three (3) State District Court in Midland County. Black residents are concentrated largely in the Northeastern, East Central and Southeastern sections of Midland County. M-04, p. 2, Map of Proposed Districts. Evidence was introduced that one (1) combined minority single member district of greater than fifty percent (50%) combined voting age population was possible. *Id.* at 1. It is possible to draw a district in which the combined minority population is in the majority even if non-citizen Hispanics of voting age are excluded. Plaintiffs' Exhibit M-15.

Political Cohesion and White Bloc Voting

14. Racially polarized voting indicates that the group prefers candidates of a particular race.[15] *Monroe v. City of Woodville*, No. 88-4433, slip op. at 5573, (5th Cir. Aug. 30, 1989). Political cohesion, on the other hand, implies that the group generally unites behind a single political "platform" of common goals and common means by which to achieve them. *Id.* at 5573.

The inquiry into political cohesiveness is not to be made prior to and apart from a study of polarized voting. The Supreme Court made clear that "[t]he purpose of inquiring into the existence of racially polarized voting is twofold: to ascertain whether minority group members constitute a politically cohesive unit and to determine whether

[15] The Supreme Court in *Gingles* adopted the definition of racial polarization offered by Dr. Bernard Grofman, appellees' expert. Dr. Grofman explained that racial polarization "'exists where there is a consistent relationship between [the] race of the voter and the way in which the voter votes' ... or to put it differently, where 'black voters and white voters vote differently.'" *Gingles*, 478 U.S. at 53 n.21.

whites vote sufficiently as a bloc usually to defeat the minority's preferred candidates." *Gingles*, 478 U.S. at 56.

15. Plaintiffs presented testimony of two experts. Dr. Richard Engstrom ("Dr. Engstrom") testified only about Harris and Dallas Counties. Dr. Robert Brischetto ("Dr. Brischetto") testified concerning all other counties at issue in this case.

16. Harris County

a. Dr. Richard Engstrom testified on behalf of Plaintiffs and Plaintiff-Intervenors in Harris County. Dr. Engstrom used 1980 U.S. Census counts of total Black population by precinct to analyze 1980 election results. For 1982, 1984, 1986 and 1988, Dr. Engstrom used precinct voter registration estimates supplied by Dr. Richard Murray, a non-testifying expert. Plaintiffs' Exhibit P-I H-08. Dr. Engstrom verified or "matched" the reliability of Dr. Murray's estimates and the 1980 Census counts by comparing Dr. Murray's estimates to an Hispanic precinct voter

registration list compiled by the Secretary of State. Testimony of Dr. Richard Engstrom. Dr. Engstrom testified that there was "a very good match."

b. Dr. Engstrom analyzed 17 general elections in Harris County. He calculated "r" values[16] between 0.798 and 0.880 for the 17 elections analyzed.[17] Plaintiffs' Exhibit P-I H-01 pp. 1-2. Dr. Engstrom's regression analysis shows a strong relationship between race and voting patterns in Harris County. *See* Appendix A to this opinion ("Appendix"), Plaintiffs' Exhibit P-I H-01 pp. 1-2. All of his correlation coefficients[18] exceed .79 (79%) except one. *Id.*, *see* section

[16] The "r" value describes the relationship between the racial composition of a precinct and the number of votes a particular candidate receives. Testimony of Dr. Engstrom. To put it another way, "how consistently a vote for Black candidate changes as the racial composition of the precinct changes." *Id.*

[17] "Crucial to the validity of regression analysis are the values for 'r' and 'r[squared]', which measure the strength of the correlation and linear relationship of the variables being examined, in this case the race of the voter and the candidate he supports." *Overton*, 871 F.2d at 539

[18] The "r" value is also referred to as the "correlation coefficient" or "Pearson r." A positive Pearson r shows that as the percentage of minorities in a precinct increases, so does the support that a minority candidate receives. A Pearson r of -1 shows the opposite, as the

on Bivariate Regression under the column heading of Correlation Coefficient. Dr. Robert Brischetto generally testified with regard to the counties in issue other than Dallas and Harris County, that a Pearson r of 1 (100%) would show perfect correlation. He further testified that social scientists consider anything over 0.50 (50%) as showing a strong correlation.

c. Further, each Pearson r is accompanied by an estimate of the likelihood that the estimate would occur by chance. This figure is known as the significance level. In the regression analyses for Harris County, as well as all the counties in issue, the significance level was much smaller than the generally accepted level of extremely high significance of .05.[19] Testimony of Dr. Robert Brischetto; Testimony of Dr.

percentage of minorities in a precinct increases, there is decrease in the support that a minority candidate receives. A Pearson r of 0 shows that there is no relationship between the racial/ethnic composition of precincts and voting behavior.

[19] A significance level of .01, for example, means that the Pearson r in question would have occurred by chance only one time out of one hundred.

Richard Engstrom. Dr. Engstrom testified that the probability that the Harris County estimates would have occurred by chance were less than 1 out of 10,000.

d. The lowest r squared for these analyses is approximately .62 (62%). This describes the percentage of the variance in voting behavior explained by race/ethnicity. Testimony of Dr. Robert Brischetto.[20] Squaring these "r" values[21] to calculate coefficients of determination demonstrates in the present case that race explains at least 62% of the variance in voting in all 17 elections relied on by Plaintiffs and Plaintiff-Intervenors.

e. The one judicial race that did not exceed the 79% figure actually had a negative correlation. This race involved Mamie Proctor, a Black candidate running on a

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[20] For example, if a Pearson r is .5, then 25% (5 x 5 or r squared) of the variance in voting behavior is explained by race/ethnicity.

[21] This figure is also known as the coefficient of determination. It is the coefficient of correlation or Pearson r multiplied by itself. It shows how much or little "noise" there is around the line of correlation or, in other words, "the percentage of variance in the vote that is explained by the race of the voters." *Overton*, 871 F.2d at 539 n.11.

Republican ticket against Henry Schuble, an Anglo, for State Family Court 245. In the 1986 Proctor race, the correlation coefficient was -0.836 (approx. -84%). *Id.* at 1; Plaintiffs' Exhibit P-I H-10 p. 2. This reflects that, as the percentage of Blacks in voting precincts increases, Proctor's support decreased. In other words, even though Ms. Proctor is Black, she did not receive the support of the Black community. Hence, she was not the preferred candidate of Black voters in Harris County. Dr. Engstrom testified on cross examination that the "candidate of choice" was the candidate who received the majority of the black vote, not necessarily the Black candidate.

f. When Dr. Engstrom controlled for Hispanic votes, Dr. Engstrom's regression analysis shows that Blacks consistently gave more than 97% of their vote to their preferred candidate. *Id.*, *see* last two columns.

g. Dr. Engstrom's homogenous precinct analysis corroborates the results of his regression analysis. *See*

Appendix A, Plaintiffs' Exhibit P-I H-01 pp. 1-2. It shows that Black voters in Harris County gave more than 96% of their votes to the preferred candidate of Black voters in every election except Proctor's. Ms. Proctor received 5% of the Black vote.

h. Finally, in all counties including Harris County, Plaintiffs "weighted" precinct data in order to account for variations in the population size of the various precincts. Testimony of Dr. Richard Engstrom; *Overton*, *supra*, at 537. Dr. Engstrom testified that on the basis of his analysis the Black community in Harris County votes cohesively in general elections for State District Court Judges.

i. Harris County Defendant-Intervenor Judge Sharolyn Wood ("Judge Wood"), attacks Plaintiffs and Plaintiff-Intervenor's proof on the following grounds: (1) Dr. Engstrom failed to establish the reliability of his data set; (2) absentee votes were not allocated to election returns; (3) the analysis does not reflect the effect of the influx of the

Vietnamese population into Harris County and traditionally Black precincts; and (4) the analysis fails to reflect black candidate successes in primary elections or uncontested races.

j. In reference to the reliability of the data set, Judge Wood points to numbers on Dr. Murray's printouts that have been written over, struck out or crossed through, pencil notations and other marks. This Court finds the data set to be reliable.

k. In response to the other concerns, Dr. Engstrom testified that: (1) primary elections were not examined in Harris County because those elections were not filtering out the candidate of choice of Black voters; (2) uncontested races do not assist researchers in their analysis; (3) the appropriate comparison in Voting Rights cases is Black and non-Black; (4) while he did not specifically control for Asian Americans, they would be included in the percentage of non-Black votes; and (5) the range of absentee votes between 1980 and 1986 never exceeded 3.2% to 7.6%,

while in 1988 that range rose to approximately 13.6% per precinct. This Court finds that Dr. Engstrom's testimony adequately addresses these concerns. The Court further finds that the lack of control for absentee votes and Asian Americans does not significantly affect Dr. Engstrom's analysis.

l. The State Defendant and Defendant-Intervenors argue that it is a candidate's political party and the strength of straight ticket party voting that determines the result of any election contest and not the difference between the preferred candidates of whites and minorities. In support of this argument, Defendants and Defendant-Intervenors point to the 1982 and 1986 Democratic sweep for judicial candidates in Harris County and a similar Republican sweep in the years 1984 and 1988. All Defendants attribute this phenomenon to top of the ticket straight party voting.[22]

[22] In 1982, Senator Lloyd Bentsen was the lead Democratic candidate on the ballot. In 1986, Governor Mark White represented the top of the ticket Democratic candidate. In Presidential election years 1984 and 1988,

m. Correlation and regression can also prove the third *Gingles* prong by showing that a white bloc vote exists. This is shown when the percentage of votes received by the minority candidate decreases as the percentage of minority persons of voting age decreases. In other words, the minority candidate receives fewer votes as the percentage of non-minority persons in a precinct increases. Regression results estimate the percentage of non-minority support for minority candidates, otherwise known as the Anglo cross over vote. Plaintiffs' Exhibit P-I H-01 pp. 1-2. column 4. This is also referred to as the Y intercept.

n. Dr. Engstrom calculated Y intercepts for the Black preferred candidate between 29 and 39 percent for the 17 elections analyzed. The highest Y intercept was 53.6%, but this percentage of the non-Black vote was for the non-preferred candidate Mamie Proctor. The highest percentage

President Ronald Reagan and President George Bush, respectively, were the top Republican candidates.

of Anglo cross over votes received by the preferred candidate of Black voters was 39 percent. *See* 1986 race Carl Walker, Jr., Black Democrat against George Godwin; *Id.* This is corroborated by a 40% Anglo cross over vote figure calculated for the same race in homogenous precincts of 90% or more non-Black population. *Id.* at column 1. Mr. Walker was the Black preferred candidate and won. Plaintiffs' Exhibit P-I H10. Two other Black preferred candidates drawing opposition in the 1986 elections lost their elections even though they had identical Black community support. These two candidates had slightly less Anglo cross over vote. Plaintiffs' Exhibit P-I H-01 pp. 1-2, column 1. Five other Black preferred candidates drawing opposition in what appears to be county-wide elections lost in the 1986 elections. Plaintiffs' Exhibit P-I H-10.[23] This analysis demonstrates that an Anglo bloc vote exists. Dr. Engstrom testified that the

[23] These candidates are: Bonnie Fitch, Raymond Fisher, Francis Williams, Sheila Jackson Lee, and Cheryl Irvin.

Anglo or white bloc vote in Harris County is sufficiently strong to generally defeat the choice of the Black community. This Court agrees.

o. Plaintiff-Intervenor Sheila Jackson Lee also testified about political cohesiveness among Black voters in Harris County. Ms. Lee has lived in Harris County approximately 11 years and has been a candidate in several judicial elections. Plaintiffs' Exhibit P-I H-01 pp. 1-2; Exhibit P-I H-10 pp. 1-3. She had many different endorsements and campaign strategies but still lost. She testified that her loss was attributable to not getting enough white votes.

p. This testimony was supported by the deposition summaries of Thomas Routt, Weldon Berry, Francis Williams and Bonnie Fitch.

q. Defendant-Intervenor Wood presented the testimony of Judge Mark Davidson. As a hobby, Judge Davidson analyzes the results of judicial elections in Harris

County. His testimony concerned his views on what he has termed "discretionary judicial voters" ("DJV").[24] Judge Davidson testified that 15% of the vote in judicial elections in Harris County were DJV's. The remaining 85% split roughly evenly between straight Democrat party and straight Republican party voting. Based upon his analysis, Judge Davidson believes that race and ethnicity are irrelevant to voting behavior as it relates to the judiciary in Harris County. He opines that DJV's determine the outcome of judicial contests in Harris County and the DJV vote can somewhat be garnered by various campaign factors. While this Court finds Judge Davidson to be a credible witness, under controlling law, the Court finds that his testimony is irrelevant.

r. The Court further finds Defendant-Intervenor Wood's contention that the Black preferred candidate lost their respective judicial race due to their failure to win the

[24] He defines DJC's as voters who vote for at least one judicial candidate of one party and at least one of the other party. DJV's are also referred to as "swing" voters.

Harris County bar or preference poll or to obtain the Gay Political Caucus ("GPC"), endorsement to be legally incompetent.

s. The complete data set used by Dr. Engstrom was used by Defendant's expert, Dr. Delbert Taebel for his analysis of Harris County. Dr. Taebel did not weight his precinct data to account for variations in population size of various precincts in Harris County or any other county at issue.

t. Dr. Taebel analyzed 23 District Court general elections where minorities opposed white candidates in Harris County. State Defendants' Exhibit D-05 pp. 9, 13, 29, 33, 37, 41, 45, 53, 61, 81, 85, 89, 93, 97, 101, 105, 137, 141, 145, 161, 165, 173 & 177. Black and white voters voted differently in all 23 District Court elections. *Id.* The Black preferred candidate won only six (6) times. The Black preferred candidate won seven (7) of 11 County Court general elections. Id. D-05 pp. 1, 5, 17, 21, 25, 109, 113, 117, 121,

125 & 129. Blacks and whites voted differently in each of those elections. Id. Dr. Taebel also analyzed nine (9) judicial primary elections; seven (7) for District Court posts and two (2) County Court posts. *Id.* D-05 pp. 49, 57, 65, 73, 77, 145, 157, 169 & 181. The Black preferred candidate won six (6) of the nine (9) primaries. Interestingly enough, each preferred candidate winning the primary lost the general election. *Id.* D-05 pp. 61, 69, 81, 153, 161 & 173.

17. Dallas County.

a. Dr. Engstrom used the same data set for his analysis of Dallas County. However, the 1980 Census counts were updated in 1982 and 1988 by the Dallas County Elections Office by reconfiguring precincts according to the changes made in precinct lines. Testimony of Dr. Richard Engstrom. Dr. Engstrom accepted the updates census counts for 1982 and 1988 as reliable. *Id.* In the intervening years of 1984 and 1986, Dr. Engstrom looked for precincts that

combined or split and aggravated precinct counts for those precincts. *Id.*

b. Dr. Engstrom analyzed seven (7) general elections for State District Court where Blacks opposed Anglos between 1980 and 1988 in Dallas County. The correlation coefficient or "r" values exceed 0.864 (86%) for six (6) of the seven (7) elections analyzed. *See* Appendix A, Plaintiffs' Exhibit D-02. Dr. Engstrom's homogenous precinct analysis and regression analysis shows a strong relationship between race and voting patterns in Dallas County. *Id.*, *see* columns 2 & 3. Dr. Engstrom testified that the significance level was much smaller than the generally accepted level of extremely high significance of .05 and that the probability that the Dallas County estimates would have occurred by chance were less than 1 out of 10,000.

c. The lowest r squared for these analyses is approximately .75 (75%). This figure is found from multiplying the r value by itself for Jesse Oliver's judicial

race in 1988. This coefficient of determination demonstrates that race explains at least 75% of the variance in voting in at least six (6) of the seven (7) elections relied on by Plaintiffs and Plaintiff-Intervenors.

d. Plaintiffs' Exhibit D-02 further shows that in five (5) of the seven (7) elections as the percentage of Blacks increased in precincts, so did Black support for the preferred candidate of Black voters. *See* Homogeneous precinct analysis, column 2.

e. Bivariate regression analysis reflects a negative correlation for Carolyn Wright's judicial race in 1986. Judge Wright is a Black who ran on the Republican ticket. She received -1.5% of the Black vote and 71.7% of the non-Black vote. Plaintiffs' Exhibit D-02, columns 4 & 5. The correlation coefficient was -0.872 (-87%). *Id.*, column 3. This reflects that, as the percentage of Blacks in voting precincts increases Judge Wright's support decreased. In other words, even though Ms. Wright is Black, she did not

receive the support of the Black community. Hence, she was not the preferred candidate of Black voters in Dallas County. Black voters also failed to support Judge Baraka, a Black Republican candidate in 1984.

f. When Dr. Engstrom controlled for Hispanic votes, Dr. Engstrom's regression analysis shows that Blacks consistently gave more than 97% of their vote to their preferred candidate. *Id.*, *see* last two columns. Dr. Engstrom's analyses shows that Blacks are politically cohesive in general elections for State District Court in Dallas County.

g. His analysis is confirmed by the testimony of Plaintiff-Intervenors' Joan Winn White, Fred Tinsely, H. Ron White and Jesse Oliver. The Exhibits reflect that each Plaintiff-Intervenor received 97% or better of the Black homogenous precincts and at least 83% of the votes in precincts with Black population of 50% to 90%. Plaintiffs' Exhibit P-I D-16 - D-22a.

h. Plaintiffs calculated the percentage of votes for the black preferred candidate, Jesse Oliver, and his white opponent, Brown, in each of the proposed hypothetical single member districts. Plaintiffs' Exhibit D-12a. They repeated this procedure for the judicial races involving the Black preferred candidates in Plaintiffs' Exhibit D-02 and Nathan Brin (an Anglo preferred by Black voters in Dallas County). Plaintiffs' Exhibits D-12b, 12c & 12d. In each instance, the Black community's preferred candidate received a majority of votes in each predominately Black hypothetical district.

i. Defendant-Intervenor Judge Harold Entz ("Judge Entz"), attacks Plaintiffs and Plaintiff-Intervenors evidence on the ground that: (1) the data is based on total population and not voting age registered voters; (2) the analysis does not reflect changes in the distribution of population over time as a result of growth of Dallas suburbs and geographic dispersal of minorities; (3) Dr. Engstrom did not control for absentee or Oriental votes; (4) there is a

stronger association between partisan affiliation and success than there is between race and success; and (5) the analysis shows what happened but not why it happened. In support of his fourth attack, Judge Entz argues that five of the seven elections analyzed involved Black candidates who are the candidate of choice, while all seven involved Democratic candidates who were the Black preferred candidate of choice. Thus, Judge Entz concludes that political party is a better predictor of the Black preferred candidate and that candidate is a victim of partisan politics not discriminatory vote dilution.

j. Dr. Engstrom testified that: (1) he was never given precinct data by race and voting age registered voters; and (2) the range of support for the Democrat candidates between 1980 and 1986 varied 10 to 17 percentage points. Thus, Dr. Engstrom concluded that something other than just straight party voting is going on in judicial elections.

k. Dr. Dan Wiser's testimony confirms Dr. Engstrom's results. Dr. Wiser's data set was based on 1980 Census data, Dallas County election returns and Dallas County precinct data adjusted for changes in precincts. Precincts that split were reconstructed by estimating the part of the precinct that shifted to another and apportioning the registered vote based on the shift and past history. Testimony of Dr. Dan Wiser. The adjusted data was checked against the 1986 Justice Department submissions. Id. Plaintiffs' Exhibit P-I D-11. Ninety eight percent (98%) of the vote in homogeneous precincts of 90% Black voters went to the Black preferred candidate. Plaintiffs' Exhibit P-I D-11, D-16 through D-23a. At least 83% of the Black community vote supported the Black preferred candidate in homogenous precincts of between 50% and 90% Black. *Id.*

l. Dr. Wiser calculates that the Asian community only comprised approximately 2.6% of the total Dallas County population as of 1985. Plaintiffs' Exhibit P-I D-03.

He testified that the best estimate of the growth of the Asian community between 1985 and the present is supplied by the Bureau of Census. Plaintiffs' Exhibit P-I D-02. He believes there has only been a growth of approximately 3% between 1985 and 1988 and does not agree with estimates of Asian leaders in Dallas County.

m. Plaintiffs and Plaintiff-Intervenors established the third *Gingles* prong by showing that a white bloc vote exists. The Y intercepts calculated by Dr. Engstrom for the Black preferred candidate ranged between 29 and 39 percent for the seven elections analyzed. Plaintiffs' Exhibit D-02. The highest Y intercepts were 61.8% and 71.7% for Judges Baraka and Wright respectively, the non-preferred candidates. *Id.* The highest percentage of Anglo cross over votes received by the preferred candidate of Black voters was approximately 39 percent. *Id.*, 1980 race involving Joan Winn White. There are 197 precincts in Dallas County that

are 90% or greater white population. Plaintiffs' Exhibit P-I D-06 & 07.

n. This is corroborated by Dr. Engstrom's homogenous precinct analysis and Dr. Wiser's analysis. *Id.* at column 1. This analysis demonstrates that an Anglo bloc vote exists. The Court finds on the basis of the exhibits and testimony of Dr. Engstrom and Dr. Wiser that the Anglo or white bloc vote in Dallas County is sufficiently strong to generally defeat the choice of the Black community.

o. Dr. Anthony Champagne testified that judicial elections in Dallas County were characterized by strong partisan affiliation rather than racially polarized voting. Dr. Champagne analyzed contested District Court general elections between 1976 and 1988. Plaintiffs' Exhibit P-I D-06-A. Dr. Champagne bases his opinion on the steady increase of Republican victories in Dallas County over time. Plaintiffs' Exhibit P-I D-07-A pp. 1-2. Only seven (7) of the contested general elections analyzed involved Blacks opposing

white candidates. Plaintiffs' Exhibit P-I D-09-A p. 1. No Black candidate running on the Democratic ticket won a general election. Two Black candidates running as Republicans won. *Id.* at 1. The Court noted, *supra*, that it was the non-Black vote that gave rise to the success of these two candidates. *See* Finding of Fact 17.e.

p. Dr. Taebel analyzed nine judicial elections in which Blacks opposed Anglos. In eight of the nine, Blacks and Anglos voted differently. State Defendants Exhibit D-06 pp. 1, 13, 17, 21, 37, 69, 73, 81 & 89; *see* Appendix B, Plaintiffs' re-Evaluation of Dr. Taebel's Reports ("Re-Evaluation") for Dallas County p. 1. The Black preferred candidate won only once. *Id.* This sole victory arose in the 1988 Republican primary. *Id.* The Black choice won only five (5) of the other twelve primary and general District Court and Appellate Court races analyzed. *Id.*; Plaintiffs' Re-Evaluation p. 2.

18. Tarrant County.

a. Dr. Robert Brischetto ("Dr. Brischetto") testified concerning on behalf of Plaintiffs and Plaintiff-Intervenors in Tarrant County and the remaining counties at issue. He weighted his analysis in all remaining counties. Dr. Brischetto used Black population data by precinct from the 1980 Census for thirty four (34) precincts in Tarrant County where precinct lines had not changed. He analyzed four (4) elections in which Blacks opposed Anglos in Tarrant County (three judicial elections and the 1988 Democratic Primary). *See* Appendix A, Plaintiffs' Exhibit Ta-02.

b. In Tarrant County and other contested counties where there was a large representation of three ethnic/racial groups, Dr. Brischetto used multiple regression analysis. Dr. Brischetto testified that this approach shows the effect of the percentage of Hispanics in precincts, for example, upon the votes received by a minority candidate, when accounting for the effect of the percentage of Hispanics. The statistical calculation that shows the effect is called the "Partial r."

c. Dr. Brischetto calculated "Partial r" values of -87%, -80% and 90% respectively for the three judicial elections analyzed. Plaintiffs' Exhibit Ta-02. There was a negative correlation in the 1986 Salvant - Drago race and the 1986 Sturns - Goldsmith race. Salvant and Sturns were Black candidates running as Republicans. They did not receive the support of the Black community. *Id.* Approximately 93% of the Black voters in precincts analyzed voted for Drago, while approximately 85% of Black voters voted for Goldsmith. *Id.* The likelihood that the estimates would occur by chance (significance level) was much smaller than .05. Testimony of Dr. Robert Brischetto. Dr. Brischetto's regression analysis shows a strong relationship between race and voting patterns in Tarrant County. The strength of the correlation is dependent on the size of the number not on the positive or negative value assigned to it. The negative correlation in the Salvant and Sturns races merely reflects that as the percentage

of Blacks in voting precincts increases, the support for Salvant and Sturns decreased.

d. The lowest r squared for these analyses is approximately 64% for the 1986 race for Criminal District Court Place 1. Race explains at least 64% of the variance in voting in all elections relied on by Plaintiffs and Plaintiff-Intervenors in Tarrant County.

e. Plaintiffs' Exhibit Ta-02 further analyzes the Jesse Jackson Democratic Presidential Primary in 1988. The Partial r for Jesse Jackson was 98%. Although the Jackson race was not a judicial election, its analysis corroborates the judicial elections analyzed. However, Dr. Brischetto testified that he would reach the same conclusions without considering the Jackson contest.

f. Dr. Brischetto's homogenous precinct analysis corroborates the results of his regression analysis. Plaintiffs' Exhibit Ta-02. It shows that Black voters in Tarrant County

gave more than 89% of their votes to the preferred candidate of Black voters in every election analyzed.

g. Dr. Brischetto also recompiled and reanalyzed Dr. Taebel's work concerning Tarrant County. Plaintiffs' Exhibit Ta-10. Plaintiffs' Exhibit Ta-10 compiles all of Dr. Taebel's analysis of countywide elections for judicial positions when Blacks opposed Anglos. Dr. Taebel also found negative correlation of -63% and -60% in the Salvant and Sturns elections respectively. *Id.* While these correlation figures are not as high as those found by Dr. Brischetto, they still reflect a strong correlation. *See* Finding of Fact 16.b last sentence.

h. Dr. Taebel used bivariate regression in his analysis. Dr. Brischetto is of the opinion that had Dr. Taebel used multivariate analysis, his correlation estimates would have been more precise. Further, Dr. Brischetto believes that the r values would have been higher, because the analysis would have eliminated the effect of Hispanics. While Dr. Brischetto did not agree with Dr. Taebel's statistical

methodology, he reviewed Dr. Taebel's work because Dr. Taebel's data set was more complete.

i. This Court finds, on the basis of all of Dr. Brischetto's analysis, the Black community in Tarrant County votes cohesively in general elections for State District Court Judges.

j. The Court further finds that the Anglo bloc vote in Tarrant County is sufficiently strong to defeat the minority community's preferred candidate. In the three general elections analyzed, the preferred candidate of Black voters lost every time. This is true even though each of the Black preferred candidates had a sizeable percent of Anglo cross over votes. Plaintiffs' Exhibits' Ta-02; Ta-10. The Y intercept reflects that Anglo support for the Black preferred candidates was between 42% and 49%. *Id.* Ta-02.

k. The testimony of Plaintiff and sitting District Judge Maryellen Hicks corroborates this analysis. Judge Hicks is Black. She testified that the only time she ran

against an Anglo in a countywide judicial election she lost. Plaintiffs' Exhibit Ta-10, County Criminal Court Place 1. She feels that she lost because she could not convince Anglos to vote for her. She also believes that she could not win if she had Anglo opposition because of the Anglo vote.

l. Judge Hicks testified that implementation of single member districts in Tarrant County had immediate effects. Before the districts went into effect, only two Blacks had been elected to School Trustee positions. Since single member districts were implemented two Blacks and one Hispanic have consistently been Trustees. Two Blacks and one Hispanic also took office on the Fort Worth City Council as a result of single member districts being implemented for that body. Further, after single member districts were established for State Representative offices, two minorities were elected to the Texas House of Representatives.[25]

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[25] After the lines were redrawn in 1982, one minority has been elected.

m. In the five primary and general judicial elections involving Black candidates analyzed by Dr. Taebel, the Black choice won only once. State Defendants Exhibit D-39 pp. 1, 29, 33, 37 & 57; *See* Appendix B, Re-Evaluation for Tarrant County p. 1. It is clear that Blacks and Anglos voted differently in these races. *Id.* In District Court general elections that did not have a Black candidate, the candidate preferred by Black voters won three (3) of five (5) times. *Id.* D-39 pp. 13, 17, 21, 25 & 61; Re-Evaluation at 1-2. In three other judicial general elections the candidate of choice of the Black community won all three times. *Id.* D-39 pp. 9, 49 & 65; Re-Evaluation at 2. Two of the three were Appellate Court elections, while the third involved the County Court at Law. *Id.* The candidate of choice also won all three primary judicial elections analyzed by Dr. Taebel. *Id.* D-39 pp. 5, 41 & 49.

19. Bexar County.

a. Dr. Brischetto based his analysis of Bexar County on Spanish surnamed registered voter data by precinct from the office of the Secretary of State of Texas. Dr. Brischetto testified that this data was the closest measure of actual registration data by precinct. Dr. Brischetto used bivariate regression analysis in Bexar County because of the very small Black population in the County.

b. He analyzed six (6) general elections from 1980 to 1988 in which Hispanics opposed Anglos. *See* Appendix A, Plaintiffs' Exhibit B-02. He calculated "r" values for Hispanic preferred candidates between 86% and 88%. *Id.* His regression analysis shows a strong relationship between race and voting patterns in Bexar County. In all but one race, as the percentage of Hispanics increased, support for the Hispanic preferred candidate increased. Dr. Brischetto testified that the probability that correlation of this size would

happen by chance was much smaller than the generally accepted level of .05.[26]

c. In the 1982 Barrera - Stohlhandski race, the Hispanic candidate, Roy Barrera, Jr. running as a Republican, received very little Hispanic support. the correlation coefficient for Mr. Barrera was -80%. *Id.* As the percentage of Hispanics in voting precincts increased, Barrera's support decreased. Barrera received approximately 17% of the Hispanic vote. *Id.* He was not the preferred candidate of Hispanic voters in Bexar County.

d. The lowest r squared for these analyses is approximately 64% for Mr. Stohlhandski, an Anglo running as a Democrat in the 1982 Barrera - Stohlhandski race. The highest r squared was 77% for the 1986 Cisneros - Peeples race. This demonstrates in Bexar County that race explains

[26] The significance level for each election is .0000. Plaintiffs' Exhibit B-02. Dr. Brischetto testified that there was practically no [or zero] probability that these correlations would happen by chance.

at least 64% to 77% of the variance in voting in all six elections.

e. Dr. Brischetto's background and homogeneous precinct analysis confirm the fact that Hispanics are politically cohesive in Bexar County. Dr. Brischetto lives in Bexar County and analyzed election behavior there in a Section 2 case involving the San Antonio River Authority. Plaintiffs' Exhibit B-16. There he found polarized voting along racial and ethnic lines in a nonpartisan election involving low profile campaigns. Dr. Brischetto's homogeneous precinct analysis shows that Hispanic voters in Bexar County gave 73% to 93% of their votes to the preferred candidate of Hispanic voters in every election.

f. Dr. Brischetto controlled for absentee votes in 1988 elections based on allocated data from the Bexar County Elections Administrator. He testified that the additional data did not change his conclusions.

g. Plaintiffs presented evidence from four hypothetical districts carved out of existing precincts for each of the six elections analyzed. Plaintiffs' Exhibits B-12a - 12e. Almost always, the Hispanic candidate who actually lost at-large would have won if he had run from a hypothetical majority Hispanic district. In one case, the 1988 Republican primary between Arellano and White, the Hispanic candidate won in only three of the four hypothetical districts. *Id.* B-12e.

h. In the 1988 Arellano - White Republican primary for the 150th District Court, Arellano ran as an appointed incumbent. White, an Anglo, decided late in the campaign that he did not want to run for office. It was too late to withdraw, but he endorsed his opponent Arellano. White nevertheless won. Adam Serrata testified in his deposition that this was a classic example of polarized voting. Deposition Summary of Adam Serrata ("Serrata Depo.").

i. Other testimony suggests the same conclusion. Judge Anthony Ferro testified in his deposition that he ran for County Court at Law four times in Bexar County. He won two races were he did not have Anglo opposition. Deposition Summary of Anthony Ferro ("Ferro Depo.") at 1. Both Messrs. Serrata and Ferro testified that it is not possible to get elected in Bexar County to the position of District Judge without Anglo support. *Id.*; Serrata Depo.

j. Dr. Brischetto further concluded that the Anglo bloc vote in Bexar County is sufficiently strong to defeat the Hispanic community's preferred candidate. In the six elections analyzed, the preferred candidate of Hispanic voters won only once. *See* 1988 Mireles - Bowles race. The Y intercept reflects that non-Hispanic support for the Hispanic preferred candidates was between 18% and 35%. It is not surprising that the one Hispanic candidate of choice who won also received the highest percent of Anglo cross over votes.

k. Judge Ferro testified that he has only been able to get elected when he did not have an Anglo opponent. Ferro Depo. Judge Paul Canales testified that voters in Bexar County pay attention to the race/ethnicity of candidates in judicial elections.

l. The effect of fairly drawn single member districts has had a positive effect on minority election results in Bexar County. Immediately after the creation of single member districts in *White v. Regester*, Hispanics were elected to the Texas House of Representatives. Further, immediately after the City Council implemented single member districts, the number of minorities on the San Antonio City Council increased. Serrata Depo.; Ferro Depo.

m. Whites and Hispanics voted differently in 28 of the 29 judicial elections involving Hispanic candidates in Bexar County. State Defendants Exhibit D-07 pp. 2-5 & 7-28; *see* Appendix B, Re-Evaluation for Bexar County p. 1-2. In the twelve general elections analyzed by Dr. Taebel,

the Hispanic preferred candidates won three (3) times. *Id.* D-07 pp. 4, 5, 7, 15-16, 18-21 & 25-28; Re-Evaluation at 1. Only one of those was a District Court election. *Id.* D-07 at 5. The Hispanic choice won six (6) out of 18 primary elections. *Id.* Re-Evaluation at 1-2.

20. Travis County.

a. Dr. Brischetto analyzed three (3) 1988 countywide judicial elections in Travis County: one primary election for the 345th District Court and two County Court at Law general elections. Dr. Brischetto testified that there has only been one Hispanic - Anglo District Court election between 1978 and 1988. In that race, the Anglo won. Plaintiffs' Exhibit Tr-11; Testimony of Jim Coronado. Mr. David Richards testified that the Republican party is significant in Travis County. Hence, Mr. Richards concluded that the Democratic Primary is the true testing ground for opposed candidates in judicial elections.

b. Dr. Brischetto used Hispanic population data by precinct from the 1980 Census reconfigured to 1988 precinct boundaries. He based his polarization and homogenous precinct analysis on total population figures for Blacks, Hispanics and Anglos in approximately 178 precincts (virtually all of them) in the County. Amalia Rodriguez Mendoza, the Travis County Registrar of Voters, provided the data.

c. Dr. Brischetto's multivariate or multiple regression analysis shows that the Hispanic community in Travis County is politically cohesive, when the effect of the Black vote is considered. Dr. Brischetto calculated "Partial r" values of 84%, 85% and 90% respectively for the three judicial elections analyzed. *See* Appendix A, Plaintiffs' Exhibit Tr-02. The Hispanic preferred candidate received at least 77% of the Hispanic vote in one election[27], 93% in the

[27] The 1988 County Court at Law race between Castro Kennedy and Hughes. Castro is the Hispanic preferred candidate. Plaintiffs' Exhibit Tr-02.

Democratic Primary election and 95 in the Garcia - Phillips race. *Id.* The likelihood that the estimates would occur by chance (significance level) was much smaller than .05. Testimony of Dr. Robert Brischetto. Dr. Brischetto's regression analysis shows a strong relationship between race and voting patterns in Travis County.

d. The homogenous precinct analysis for Travis County establishes a similar pattern. Plaintiffs' Exhibit Ta-02. It shows that Hispanic voters gave more than 63% and as high as 90% of their votes to the Hispanic preferred candidate.

e. Dr. Brischetto also reanalyzed the same three elections using bivariate regression analysis based upon voter registration data. *See* Appendix A, Plaintiffs' Exhibit Tr-19. These correlation figures are very close to those calculated using multivariate analysis, and clearly reflect strong correlation. *See* Finding of Fact 16.b. last sentence. With either data set, Dr. Brischetto's analysis shows that as

the percentage of Hispanics in precincts increase, so does support for the Hispanic preferred candidate. The r squared figures all exceed approximately 64%.

f. The Hispanic preferred candidates took the majority of the votes from Plaintiffs' hypothetical districts even though they lost countywide. Plaintiffs' Exhibit Tr-12.

g. The State Defendants were concerned that Plaintiff's did not analyze Statewide judicial or legislative elections. *See* Cross examination of Jim Coronado; Cross examination of Dr. Brischetto. Dr. Brischetto testified that Plaintiffs focused on local elections when that data was available and these elections were not reached in Plaintiffs' hierarchy of priority. He further testified that the elections analyzed were the closest in nature to District Court elections. Dr. Brischetto felt that once he had three elections he could determine a sufficient pattern. This Court agrees.[28]

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[28] *Gingles* itself relied on only analysis of three elections in Senate District 22 (1978, 1980 & 1982) and House District 21 (1978, 1980 & 1982). *Gingles*, 478 U.S. at Appendix A.

h. The State Defendants attack Dr. Brischetto's analysis on the ground that he did not take into account: (1) absentee voting; and (2) the number of non-United States citizens, Blacks or Anglos with Spanish surnamed in Travis County.

i. Dr. Brischetto controlled for absentee votes in 1988 elections in Bexar County. He testified that Bexar County had the highest absentee voting than anywhere in the State. He concluded in his Bexar County analysis that absentee voting did not change his conclusions. *See* Findings of Fact 19.f. This Court finds that the results would not be significantly different in Travis County.

j. Spanish surname counts were based on persons who identified themselves in Census counts as being of Spanish origin. While the Court recognizes that the Census definition of Spanish origin includes many parallel ethnic backgrounds, this Court finds that the probability of overlap of Black and/or White voters is very slight.

k. Finally, the State Defendants claim that the analyses of the Democratic Primary between Judge Gallardo (the Hispanic preferred candidate) and McCown is misleading. Witnesses for the State Defendants testified that Judge Gallardo lost because he was a bad judge. Depositions of Becky Beaver & Fernando Rodriguez; Testimony of David Richards. While this may be true, under controlling law, it is the correlation between the race of the voter and the selection of certain candidates that is crucial to this Court's inquiry. *Gingles*, 478 U.S. at 63.

l. The Court further finds that the Anglo bloc vote in Travis County is sufficiently strong to defeat the minority community's preferred candidate. The preferred candidate of Hispanic voters lost each election analyzed. Two of the Hispanic preferred candidates received approximately one third Anglo cross over votes. Plaintiffs' Exhibits' Tr-02; Tr-19. The other candidate received only approximately 14% Anglo cross over votes. *Id.* Tr-02.

m. In each of the hypothetical districts, the candidate of choice of the Hispanic community received the most votes; in two districts the candidate of choice received a majority.

n. Dr. Taebel analyzed the same three elections analyzed by Plaintiffs' expert. State Defendants Exhibit D-08; *See* Appendix B, Re-Evaluation for Travis County p. 1. His analysis confirms that in these three races whites and Hispanics voted differently and the Hispanic preferred candidate lost each time. Id. D-08 pp. 33, 37 & 41. The Hispanic preferred candidate fared better in Appellate elections winning one primary runoff and two general elections.. *Id.* D-08 pp. 25, 29 & 45. Hispanic and white voters did not vote differently in these three election contests but did so in the 1984 and 1986 Democratic primary for County Court numbers 1 and 7. Id. D-08 pp. 33 & 41.

21. Jefferson County.

a. Dr. Brischetto used Black population data by precinct from the 1980 Census for all of his analysis in Jefferson County. He testified that population had changed very little in Jefferson County. Plaintiffs' Post Trial Brief at 95. Only those precincts that retained unchanged boundary lines were used in his analysis.

b. He analyzed five (5) Democratic primary elections, two (2) Democratic primary runoffs and the 1988 Presidential Democratic primary. *See* Appendix A, Plaintiffs' Exhibit J-02 pp. 1-2. Four of the five primaries analyzed involved Justice of the Peace contests. The fifth was for a County Court at Law post. Dr. Taebel did not analyze any of these elections. State Defendants' Exhibit D-09. Each of the Justice of the Peace election precincts covered at least an entire city which are the largest urban areas of the County. Precinct 1 covers the City of Beaumont, Texas. Precinct 2 covers the City of Port Arthur, Texas. Tom Hanna testified in his Deposition that running for office from these precincts

is equivalent to running at large from the two cities. Dr. Brischetto testified that there were no primary or general elections for District Court seats that pitted Black against Anglo.

c. Dr. Brischetto used multivariate regression analysis in his examination of Jefferson County separating out the effect of the Hispanic vote. He calculated "Partial r" values between 66% and 97% for the judicial primaries and runoff elections analyzed. *Id.* The partial r for the Black preferred candidate in the Democratic Presidential Primary, Jesse Jackson, was 97%. *Id.* The likelihood that the estimates would occur by change (significance level) was much smaller than .05. *Id.* Dr. Brischetto's regression analysis shows a strong relationship between race and voting patterns in Jefferson County. The Black preferred candidate received a clear majority of Black community support in at least five of the seven judicial contests analyzed. *Id.*, multivariate and homogeneous analysis for 1972 to 1978. In the 1982 primary

for Justice of the Peace, Precinct 1, Place 2, the Black preferred candidate Cannon received approximately 51% of the Black community vote, while two opponents split the remaining 49%.

d. In one instance, the Black preferred candidate did not receive a majority of the Black community vote. In the 1986 Democratic Primary for Justice of the Peace, Precinct 1, Place 2, the Black preferred candidate, Wilmer Roberts, only received 47% of the Black vote (40% in homogeneous precincts). The other 53% (60% in homogeneous precincts) was split between four candidates. John Paul Davis, a Black attorney from Jefferson Country, testified in his Deposition that he supported the white candidate because she was the most liberal at the time he made his choice and Mr. Roberts announced late in the race.

e. The r squared figures range from 44% for one race (1972 runoff) to 94% for three races (1978 & 1982 judicial primaries and 1988 Presidential primary). It is clear

from Dr. Brischetto's analysis of voting patterns in Jefferson County that as the percentage of Blacks increase in a precinct, the percentage of support for the Black preferred candidate increases.

f. Dr. Brischetto examined the votes cast in a hypothetical district for the 1978 Democratic Primary between Mr. Davis and an Anglo opponent. The analysis shows that Davis received more votes in each precinct and a majority of the vote in the district. Plaintiffs' Exhibit J-09.

g. State Defendants argue that the three races analyzed in 1982, 1986 and 1988 either show no racial polarization or a victory for the Black preferred candidate. This Court disagrees. As the Court discussed, *supra*, the Black preferred candidate was supported by a majority of the Black community in the 1982 Democratic Primary. *See* Finding of Fact 21.c. With reference to the 1986 Democratic Primary, the Court finds that the State Defendants' evidence is not conclusive that the Black community either would not

have cohesively supported Wilmer Roberts had he announced earlier or that the Black community cohesively supported some other candidate. Plaintiffs' Exhibit J-02; Finding of Fact 21.d. The Court further finds that while Jesse Jackson may have carried Jefferson County in the 1988 Presidential Primary, that fact alone is a far cry from whether the Black preferred candidate is successful in Jefferson County.

h. State Defendants further point to the 1984 Democratic Primary between John Paul Davis and Donald Floyd, both of whom are Black, to demonstrate that the Black community is not politically cohesive in Jefferson County. While Mr. Floyd won the primary and the election, Defendants did not demonstrate that the Black community split their vote or failed to support one candidate over another.

i. This Court finds on the basis of the foregoing discussion that the Black community in Jefferson County votes cohesively in judicial elections.

j. In at least five of the seven elections analyzed it is clear that blacks and whites voted differently and the preferred candidate of Black voters lost every time. The Black communities candidate of choice received 25% to 41% of the Anglo cross over vote in election years 1972 and 1974. The percentage dropped thereafter to a low of 2% for Wilmer Roberts in 1986 and a range of 7% to 10% for the other two judicial races. Plaintiffs' Exhibit' J-02. Although the Black preferred candidate received 70% to 93% of the Black community vote in five of the seven elections analyzed they still lost countywide.

k. The Court finds that the Anglo bloc vote in Jefferson County is sufficiently strong to defeat the minority community's preferred candidate.

l. No Black attorney has run for the position of District Judge in Jefferson County. Deposition Summary of John Paul Davis. Mr. Davis feels that Black lawyers do not

run for the office because of the high probability of defeat. *Id.*

m. Implementation of single member legislative and Commissioner's Court districts resulted in the election of Black preferred candidates to those positions. Deposition Summary of Thomas Hanna.

22. Lubbock County

a. Dr. Brischetto used population data from the 1980 Census precinct boundaries for his analysis in Lubbock County. He initially based his review on 30 of 76 precincts which had not changed between 1980 and the relevant elections analyzed. The analyzed additional precincts that he was able to reconfigure by use of Census block maps.[29]

b. Dr. Brischetto relied on appellate judicial contests. He testified that no relevant local judicial contests

[29] He analyzed 48 of the 76 total precincts in the 1986 primary, 44 of 76 in the 1986 runoff, 48 in the 1986 general election and 47 in the 1988 general election. *See* Plaintiffs' Post Trial Brief at 109 n.55.

involved a minority opposed by an Anglo candidate. He further testified that he did not analyze local Justice of the Peace races because the Justice of the Peace precincts were not at least as large as a major city. He analyzed two (2) Supreme Court general elections, two (2) Democratic primary elections and two (2) Democratic primary runoffs. See Appendix A, Plaintiffs' Exhibit L-02, pp. 1-3.

c. Dr. Brischetto used bivariate, multivariate regression and homogeneous precinct analysis in his examination of Lubbock County. The bivariate analysis produced correlation coefficients in excess of 87% with a corresponding r square figure of 76%. *Id.* He used multiple regression analysis to show that Blacks and Hispanics vote together. This analysis revealed that the two groups favored the same candidates in each election. *Id.* The lowest partial r calculated for Hispanic voters was 78% in the 1986 Democratic Runoff for Supreme Court place 4. The lowest partial r for Black voters was 56% in the 1986 Democratic

Primary for the same Court prior to the runoff election. The likelihood that the estimates would occur by chance (significance level) was much smaller than .05. *Id.* Dr. Brischetto's regression and homogeneous precinct analysis shows a strong relationship between race/ethnicity and voting patterns in Lubbock County. The combined minority preferred candidate received a clear majority of combined minority community support in each election analyzed. *Id.*

d. It is clear from Dr. Brischetto's analysis of voting patterns in Lubbock County that as the percentage of minorities increase in a precinct, the percentage of support for the minority preferred candidate increases. This Court finds that Blacks and Hispanics are cohesive as a group in Lubbock County judicial elections.

e. Maria Luisa Mercado, a Hispanic attorney from Lubbock County, testified that Blacks and Hispanics work together in the County on many significant issues. Deposition Summary of Maria Luisa Mercado ("Mercado Depo.").

f. The State Defendants point to the 1984 race for Justice of the Peace between Sedeno, a Hispanic candidate running as a Democrat, against a Black Republican candidate, McKinley Shephard to illustrate that Blacks and Hispanics do not vote cohesively as a group. The Black boxes voted for Mr. Shephard. Mercado Depo. at 2. Dr. Brischetto testified that this race was not analyzed because the Justice of the Peace precinct in question split the City in half. "It did not include a large majority of the County or a large metropolitan area." Testimony of Dr. Robert Brischetto. This Court finds that the Sedeno - Shephard race does not illustrate that Blacks and Hispanics do not vote cohesively in at-large judicial elections. The Court further finds that Blacks and Hispanics opposing each other says less about the collective cohesiveness of the two groups when either opposes an Anglo.[30]

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[30] State Defendants further point to Hispanic - Black state representative races in Lubbock County in 1984 and 1986.

g. Minorities and whites voted differently in each election analyzed. However, the preferred minority candidate won on two of six occasions. Plaintiffs' Exhibit L-02, p. 2, 1986 Primary for Court of Criminal Appeals, Place 1 and 1986 Runoff. In one of those two races, the minority preferred candidate received 46% of the Anglo cross over votes from homogeneous white precincts of 90% to 100% white population. *Id.*, 1986 Runoff. The minority communities candidate of choice received 39%, 40% and 41% of the Anglo cross over vote, respectively, in three other elections and still lost. *Id.*, 1986 General Election, 1988 General Election and 1986 Democratic Primary, Supreme Court, Place 4, respectively. The Court finds that the Anglo bloc vote in Lubbock County is sufficiently strong to defeat the minority community's preferred candidate.

h. Defendants argue that Justice Gonzalez may possibly have received more Anglo votes in the 1986 Democratic Runoff with 36% than either of his three

opponents, assuming the remaining 64% of the Anglo votes were evenly split. Defendants conclude on that basis that Anglos did not vote overwhelmingly against Justice Gonzalez. This Court disagrees. Assuming arguendo that Defendants assumption is correct, the Court finds that Anglo's did overwhelmingly vote against Justice Gonzalez even if they did not vote overwhelmingly for a different candidate.

i. Dr. Brischetto testified concerning some countywide elections in *Jones v. City of Lubbock*, 727 F.2d 364, 383 (5th Cir. 1984). His conclusions in *Jones* corroborate his testimony in this case.

j. Ms. Mercado testified that Black and Hispanic candidates have not been successful in at large elections. Mercado Depo. She testified that she carried all minority boxes and zero Anglo boxes in her 1978 bid for City Council. *Id.* Blacks and Hispanics have been successful running for School Board and County Commissioner's positions after the implementation of single member districts. *Id.*

k. Dr. Taebel only analyzed two of the same Appellate Court contests analyzed by Dr. Brischetto. State Defendants' Exhibit D-10 pp. 17 & 25. In both, minorities and whites voted differently and the minority choice lost. Similar results were obtained in two County Court at Law General Elections analyzed by Dr. Taebel. *Id.* D-10 pp. 5 & 9. However, in those two races there was no minority candidate. *See* Appendix B, Re-Evaluation of Lubbock County.

23. Ector County

a. Dr. Brischetto used population data from the 1980 Census precinct boundaries to analyze 24 of the 31 total precincts in Ector County which had not changed between 1980 and the relevant elections analyzed. As in Lubbock County, he relied on appellate judicial contests. He analyzed two (2) Supreme Court General Elections and two (2) Democratic Primary Elections. *See* Appendix A, Plaintiffs' Exhibit E-02, pp. 1-2. He testified that no County or District

Court contests involved a minority opposed by an Anglo candidate.

b. Dr. Brischetto used the same statistical analysis used in Lubbock County. Bivariate analysis was used to separate the white and minority votes. Testimony of Dr. Robert Brischetto. Multivariate analysis was used to separate the Black and Hispanic vote. *Id.* The bivariate analysis produced correlation coefficients in excess of 78% with a corresponding r square figure of 61%. Plaintiffs' Exhibit E-02, pp. 1-2. Multiple regression analysis shows that Blacks and Hispanics vote together. This analysis revealed that the two groups favored the same candidates in each election. *Id.* The lowest partial r calculated for Hispanic voters was 46% in the 1986 Democratic Primary for Supreme Court Place 4. The lowest partial r for Black voters was 60% in the 1988 General Election for Supreme Court, Place 3. The likelihood that the estimates would occur by chance (significance level)

was much smaller than .05. Testimony of Dr. Robert Brischetto.

c. A clear majority of the combined minority community supported the preferred minority candidate in each election analyzed. Even in the race for Supreme Court, Place 4, Justice Gonzalez, received 42% of the Hispanic vote and 65% of the Black community vote. *Id.* Dr. Brischetto's regression and homogeneous precinct analysis shows a strong relationship between race/ethnicity and voting patterns in Ector County. The lowest level of combined support is reflected as 50% in the Democratic Primary for Supreme Court, Place 4. *Id.*, Homogeneous precinct analysis, p. 2. Dr. Brischetto attributes the lack of stronger minority group cohesiveness in that race to the fact that one of the candidates in the Primary was from Ector County. *Id.*, Candidate Gibson. However, in the General Elections for 1986 and 1988, homogeneous precincts of 80% or more combined

minority gave more than 80% of their vote to the minority preferred candidate.

d. It is clear from Dr. Brischetto's analysis of voting patterns in Ector County that as the percentage of minorities increase in a precinct, the percentage of support for the minority preferred candidate increases. This Court finds that Blacks and Hispanics are cohesive as a group in Ector County judicial elections.

e. Minorities and whites voted differently in each election analyzed. Minorities supported the minority preferred candidates in much greater percentages than Anglo voters. The preferred minority candidate won only one race analyzed. See Plaintiffs' Exhibit E-02, p. 2, 1986 Primary for Court of Criminal Appeals, Place 1.

f. Minorities have been elected to Justice of the Peace and County Commissioner's positions from predominately minority precincts. Deposition Summary of Lawrence Leo Barber ("Barber Depo.")

g. Dr. Taebel's analysis of the same two Appellate Court contests confirmed Dr. Brischetto's analysis. State Defendants' Exhibit D-11 pp. 21 & 37. In both, minorities and whites voted differently and the minority choice lost. Dr. Taebel further analyzed five (5) General Election judicial contests that did not involve positing an Anglo against a minority. *Id.* pp. 5, 9, 13, 29 & 33. Minorities and whites voted differently and the minority preferred candidate lost in three of the five. *See* Appendix B, Re-Evaluation of Ector County.

24. Midland County

a. Dr. Brischetto based his analysis on population data from the 1980 Census. He analyzed 11 of the 36 total precincts for 1986 and 10 of 36 for 1988 that had boundaries that had not changed. He was also able to reconfigure boundaries for 22 precincts in 1986 and 23 in 1988. Testimony of Dr. Robert Brischetto. He relied on appellate races and one Justice of the Peace race since there have been no

local countywide election contests in which minorities opposed Anglos. The Justice of the Peace race encompassed the entire City of Midland. Testimony of Aquilla Watson. He analyzed three elections in total. *See* Appendix A, Plaintiffs' Exhibit M-02. Dr. Taebel did not analyze the Justice of the Peace contest.

b. Dr. Brischetto used bivariate regression analysis in Midland County. The bivariate analysis produced correlation coefficients in excess of 89% with a corresponding r square figure of 79%. *Id.* Better than 85% of the combined minority voted for the minority preferred candidate in each race. *Id.* The likelihood that the estimates would occur by chance (significance level) was much smaller than .05. Testimony of Dr. Robert Brischetto. Dr. Brischetto's regression and homogeneous precinct analysis shows a strong relationship between race/ethnicity and voting patterns in Midland County.

c. It is clear from Dr. Brischetto's analysis of voting patterns in Midland County that as the percentage of minorities increase in a precinct, the percentage of support for the minority preferred candidate increases. This Court finds that Blacks and Hispanics are cohesive as a group in Midland County judicial elections.

d. It is further clear that minorities and whites voted differently in each election analyzed. Minorities supported the minority preferred candidate in much greater percentages than Anglo voters. The preferred minority candidate lost each race analyzed despite the large percentages of combined minority support. *Id.*

e. This analysis is supported by Dr. Brischetto's analysis and testimony in *Lulac v. Midland ISD*, 648 F.Supp. 596, 600 (W.D. Tex. 1986), *aff'd*, 812 F.2d 1491 (5th Cir. 1987), *vacated* 829 F.2d. 546. Plaintiffs' Exhibit M-05.

f. Aquilla Watson testified that she received very few Anglo votes. She only carried four (4) of the thirty-six

(36) precincts. Only one of the four included some Anglo cross over votes. Testimony of Aquilla Watson. Minorities have been elected to the School Board and County Commissioner's Court from predominately single member districts. *Id.*

g. Dr. Taebel analyzed four (4) judicial contests in which a minority candidate ran against one or more white candidates. State Defendants' Exhibit D-12 pp. 9, 21, 25 & 29. Minorities and whites voted differently and the minority choice lost in the two General Elections analyzed. *Id.* pp. 25 & 29. The minority choice also lost in both primary elections, but there is some indication that minorities and some white voters voted the same. *Id.* pp. 9 & 21. *See* Appendix B, Re-Evaluation of Midland County.

ACCESS TO THE POLITICAL PROCESS

History of Discrimination

25. The effect of past discrimination against Blacks and Hispanics in areas such as education, employment and

health in most of the Counties in question is either well chronicled or undisputed. *See, e.g., Lulac v. Midland ISD*, 648 F.Supp. 596, 600 (W.D. Tex. 1986), *aff'd*, 812 F.2d 1491 (5th Cir. 1987), *vacated* 829 F.2d 546; *Campos v. City of Baytown*, 840 F.2d 1240, 1243 (5th Cir. 1988), *reh'g denied*, 849 F.2d 1240, *cert. denied*, ___ U.S. ___ (1989); *Lipscomb v. Jonsson*, 459 F.2d 335 (5th Cir. 1972); *Graves v. Barnes*, 343 F.Supp. 704, 725 n.15, 730-34 (W.D. Tex. 1972), *rev'd in part and remanded sub nom, White v. Regester*, 412 U.S. 755 (1973), *on remand*, 378 F.Supp. 640, 644 (1974); *Terrazas v. Clements*, 581 F.Supp. 1329, 1334 (N.D. Tex. 1984); *United States v. Texas Ed. Agcy., Etc.*, 564 F.2d 162, 163 (5th Cir. 1977), *reh'g denied*, 579 F.2d 910 (1978), *cert. denied*, 443 U.S. 915 (1979); *Blackshear Residents Organization v. Housing Auth. of City of Austin*, 347 F.Supp. 1138 (W.D. Tex. 1971); *Jones v. City of Lubbock*, 727 F.2d 364, 383 (5th Cir. 1984); *United States v. CRUCIAL*, 722 F.2d 1183, 1185 (5th Cir. 1983). *See also*

Plaintiffs and Plaintiff-Intervenors Exhibits reflecting social stratification.

26. This history touched upon many aspects of the lives of minorities in the Counties in question including their access to and participation in the democratic system governing this State and their socio-economic status. "The administration of justice in Texas was overwhelmingly dominated by Anglo males in 1968, and the overall pattern [had] changed very little" by 1978. Plaintiffs' General Exhibit ("Gen") 02, *Texas: The State of Civil Rights (Ten Years Later, 1968-1978)*, A Report of the Texas Advisory Committee to the United States Commission on Civil Rights at 22 (1980); *City of Port Arthur, Texas v. United States, et al.*, 517 F.Supp. 987, 1020 (D.D.C. 1981)(three judge court), *aff'd*, 459 U.S. 159 (1982).

Enhancement

27. Candidates for District Court must run for a specific Judicial District Court seat. This is equivalent to a

numbered post system.[31] District Judges must be nominated in the primary by a majority of the votes.

> "This provision insures that essentially white voting majorities have a 'second shot' at [minority] candidates who have failed to muster a majority of the votes in the first election. Time and again, in election after election, minority candidates win a plurality in the first election, only to lose the runoff in highly racially polarized voting."

Testimony of Dr. Charles Cotrell at 491, Hearings Before the Subcommittee on Constitutional Rights of the Committee on the Judiciary, United States Senate (94th Cong. 1st Sess.) S. 407, S. 903, S. 1409, S. 1443 (1975); Plaintiffs' Exhibit Gen.-03 at 491. Finally, the size of at least five of the nine target counties further enhance the problems that minority candidates face when they seek office. Plaintiffs' Exhibit Tr-15 shows that Harris, Dallas, Tarrant, Bexar and Travis

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[31] "A numbered-post system requires a candidate to declare for a particular seat on a [G]overnmental body. The candidate then runs only against other candidates who have declared for that position. The voters then have one vote for that seat. The system prevents the use of bullet, or single shot, voting. *Campos*, 840 F.2d at 1242 n.1 [*citing Gingles*, 478 U.S. 38-9 nn. 5 & 6].

Counties have very large populations. *See also* Plaintiffs' Exhibit P-I D-4.

Slating

28. Slating has been defined as the creation of a package or slate of candidates, before filing for office, by an organization with sufficient strength to make the election merely a stamp of approval of the pre-ordained candidate group. *Overton*, 871 F.2d at 534. Dr. Wiser depicted the Republican Party in Dallas County as a white-dominant slating group. This Court finds that such characterization is at odds with the governing law and facts of this case. Plaintiffs and Plaintiff-Intervenors did not present evidence of slating in Harris, Tarrant, Bexar, Travis, Jefferson, Lubbock, Ector and Midland Counties.

Racial Appeals

29. Plaintiff-Intervenor for Dallas County, Joan Winn White, argued that racial appeals were injected into her 1980 judicial race against Charles Ben Howell when an

advertisement he ran made reference to his opponent (Ms. White) as the "affirmative action appointee." Plaintiffs Exhibit P-I D-30. The Court notes and Ms. White testified that the term "affirmative action" is used in reference to sex as well as race. The Court finds that there is nothing inherently racist about referring to an affirmative action judicial appointment.

30. Plaintiff-Intervenors from Dallas County also argue that racial appeals were inserted into the 1986 election between Royce West and John Vance and the 1988 Republican Primary between Larry Baraka and Brook Busby. This Court agrees. In the West - Vance race, Mr. Vance made a racial appeal by inserting his opponent's picture in a campaign advertisement financed by Mr. Vance's campaign. In the Baraka - Busby race, Ms. Busby campaigned with literature pointing out that her opponent was a Black Muslim. Plaintiffs and Plaintiff-Intervenors did not present evidence of racial appeals in the remaining Counties at issue.

Electoral Success

31. Since 1980, seventeen Blacks have run for State District Court Judge in Harris County. Only 2 (approx. 12%) won. Plaintiffs' Exhibit H 07. Seven Blacks have opposed Anglos in District Court General Elections in Dallas County and won only two elections (29%). Plaintiffs' Exhibit D-09. However, neither of these candidates was the candidate of choice of the Black community. Only one Hispanic candidate of choice won in Bexar County in six Hispanic - Anglo elections. Plaintiffs' Exhibit B-11. The Black community's preferred choice achieved the District Court bench only once out of three elections when Blacks ran against Anglos in Tarrant County. Plaintiffs' Exhibit Ta-07. Only one Hispanic candidate ever ran against an Anglo for a District Judge seat in Travis County. The Hispanic candidate lost. Plaintiffs' Exhibit Tr-11. No minority candidate has run for the office of District Court Judge in Jefferson County. John Paul Davis testified at his deposition that the at-large system

discourages eligible Black attorneys from running because the chance of success is so slim. At least three Black attorneys sought appointment to the District Court bench. Deposition Summary of John Paul Davis ("Davis Depo."). Similar testimony was elicited on behalf of Plaintiffs in Lubbock County. Mercado Depo. No minority candidate has run for District Court Judge in Lubbock, Ector or Midland County.

32. State Defendants argue that the eligible pool of minority lawyers, rather than eligible minority voters, is the appropriate reference point for evaluating the extent of electoral success. State Plaintiffs' Exhibit D-04. The Court notes that the two cases relied upon by the State involve Title VII issues and do not address the relevant statistical pool in a § 2 case. *See Richmond v. J.A. Croson Co.*, 109 S.Ct. 706, 725-26 (1989); *Wards Cove Packing Co. v. Atonio*, 109 S.Ct. 2115, 2121-22 (1989). State Defendants recognize that the pool of eligible lawyers is small, due in part, to historical discrimination. The Court finds that even if there is some

relationship between the low number of minority judges and the number of eligible minority lawyers, that fact does not explain why well qualified eligible minority lawyers lose judicial elections.

Responsiveness

33. This Court cannot find anything in the record to suggest a lack of responsiveness on the part of Judges in any of the Counties in question to the particularized needs of members of the minority community.

Tenuousness

34. Several reasons were offered for the maintenance of the at-large system. State Defendants and Defendant-Intervenor Wood argued that (1) judges elected from smaller districts would be more susceptible to undue influence by organized crime; (2) changes in the current system would result in costly administrative changes for District Clerk's offices; and (3) the system of specialized courts in some counties would disenfranchise all voters rights

to elect judges with jurisdiction over some matters. Plaintiff-Intervenors, HLA, allege that the at large scheme was adopted with the intention to discriminate against Black voters in violation of the Fourteenth Amendment to the United States Constitution.

35. Chief Justice of the Texas Supreme Court, Thomas Phillips, testified that the purpose of Article 5, Section 7a(i) of the Texas Constitution was to create the Judicial Districts Board which could equalize the dockets of District Judges. To further that goal, Article 5, Section 7a(i) requires that judges be elected from districts no smaller than a county. Apparently, the rationale for such provision is that District Judges should not be responsible to voters over an area smaller than area where they have primary jurisdiction.

36. Plaintiff-Intervenors offered the Deposition summary of Senator Craig Washington in support of their claim that discriminatory intent was the focus of the legislative deliberations surrounding the passage of Section

7a(i). The Court notes that Senator Washington sat on the Conference Committee and signed the Conference Committee Report recommending the adoption of the Senate Joint Resolution containing the exact language of Section 7a(i), Tex. S.J. Res. 14, 69th Leg. (1985). *See* Defendant Intervenor Wood's Exhibit 59. Subsequently, Senator Washington on the Senator floor voted for the adoption of S.J. Res. 14. *Id.* The Court further notes that three Hispanic Senators voted in favor of S.J. 14: Senator Barrientos, Senator Truan and Senator Uribe.

37. Plaintiffs and Plaintiff-Intervenors have the burden to establish that the at-large system is maintained on a tenuous basis as a pretext for discrimination. *Overton*, 871 F.2d at 535. While the Court does not find that the present system is maintained on a tenuous basis as a pretext for discrimination, the Court is not persuaded that the reasons offered for its continuation are compelling.

38. Under a single member scheme or some other scheme Judges may be made responsible to voters over an area no smaller or larger than the area where they have primary jurisdiction. This Court finds no reason why all Judges cannot exercise general jurisdiction over their geographic area of responsibility. The Court further finds that administrative functions and jury selection could continue to be done on a countywide basis.

39. Our legislative body has seen fit in the past to create in some counties specialty courts. In the mind of this Court this is wrong. Judges of civil dockets or judges of criminal dockets have equal access to legislation and published opinions. They are not intellectually inferior to judges who hear civil, criminal and domestic cases. The body of law is large, but is handled capably and well by most judges in this State who hear all types of litigation. Lawyers specialize. Judges are capable of rendering fair, honest and

just decisions without concentrating in one narrow field of law.

STATE DEFENDANTS' ANALYSIS

General

40. State Defendants argue that the Supreme Courts incorporation in *Gingles*, of the Senate Report accompanying the 1982 Amendment to § 2, signals a return to the Supreme Court's pre-*Gingles* analysis in *Whitcomb v. Chavis*, 403 U.S. 124 (1971). In *Whitcomb*, the Supreme Court rejected a racial vote dilution challenge to an at-large system for electing state legislators, essentially on the ground that partisan preference best accounted for electoral outcomes in Marion County, Indiana. The Court in *Whitcomb* concluded that there was no indication in the record of that case that Blacks were being denied access to the political system.

41. This Court is not convinced that the State Defendants are making the correct call. In any event, the Court finds that this Court's analysis of the Senate factors

applicable to the present case point to the continual effects of historical discrimination hindering the ability of minorities to participate in the political process.

42. Next, State Defendants are of the opinion that there are really two questions before this Court, depending on what electoral stage is being analyzed. At the primary stage the question is whether the minority candidate of choice in the Democratic Primary is prevented more often than not by a Democratic white bloc vote from being the party's nominee in the General Election. State Defendants' Post Trial Brief at 9. At the General Election stage the question becomes whether there is a pattern of substantial desertion from the Democratic party by white voters to vote for a Republican candidate, thereby denying victory to the minority candidate of choice. *Id.* at 10. This Court finds such a distinction unimportant. Assuming the first two elements of the *Gingles* test are met and the Senate factors point to vote dilution, it is unimportant whether a white bloc vote, which is sufficient -

absent special circumstances - usually to defeat the minority's preferred candidate, takes place at one election stage, both stages or by Democrats or Republicans.

43. The issue of partisan voting was before the Supreme Court in *Gingles*. The Court had no difficulty concluding that voting polarized along racial, not partisan, lines. *Gingles*, 478 U.S. at 61-62. Party affiliation is simply irrelevant under the controlling law. Further, "the addition of irrelevant variables [to regression or statistical analysis] distorts the equation and yields results that are indisputably incorrect under § 2 and the Senate Report." Id. at 64.

Statistical

44. The complete data set used by Dr. Engstrom in Harris and Dallas Counties was used by Defendant's expert, Dr. Taebel for his analysis of those Counties. Dr. Taebel's data set for analysis in the other seven counties appears to be very similar. He did drop homogeneous precincts from his analysis if there was more than a ten percent (10%) change

in precinct boundary census data since the 1980 Census counts. Dr. Taebel analyzed both primary and General Elections in not only minority - Anglo contests, but also minority Republican candidates opposed to white candidates and white - white contests. He also analyzed elections in which the minority preferred candidate ran unopposed. This Court finds that unopposed election contests and white versus white contests are not germane in this Circuit to this Court's analysis. *Westwego Citizens For Better Government v. Westwego*, 872 F.2d 1201, 1208 n. 7 (5th Cir. 1989); *Campos v. City of Baytown*, 840 F.2d 1240, 1245 (5th Cir. 1988), *reh'g denied*, 849 F.2d 1240, *cert. denied*, __ U.S. _ (1989); *Citizens For a Better Gretna v. City of Gretna*, 834 F.2d 496, 503 (5th Cir. 1987).

CONCLUSIONS OF LAW

1. This Court has jurisdiction pursuant to 28 U.S.C. § 1331, 18 U.S.C. § 1432 and 42 U.S.C. § 1973C.

Venue is proper in this District pursuant to 28 U.S.C. § 1400(b).

2. It is settled in this Circuit that § 2 of the Voting Rights Act applies to the judiciary. *Chisom v. Roemer*, 839 F.2d 1056 (5th Cir. 1988), *cert. denied*, *sub nom*, *Chisom v. Edwards*, 109 S.Ct. 310 (1989) (*Chisom* I). However, it is clear that at-large judicial elections may not be considered *per se* violative of § 2. Furthermore, the Court holds that § 2 applies equally as well to State District Judicial elections as it does to appellate elections.[32]

Standard Under The Voting Rights Act

3. In *Thornburg v. Gingles*, 478 U.S. 30, 106 S.Ct. 2752, 92 L.Ed.2d 25 (1986), the Supreme Court construed Section 2 of the Voting Rights Act, as amended, to

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[32] State Defendants argue that State District Judgeships cannot be analogized to legislative or appellate posts, which by nature are characterized by collegial decision making. While the Court recognizes that State District Judges function as sole, independent decision makers, the Court concludes that there is no indication that *Chisom*'s extension of § 2 to judicial elections was meant to be limited to collegial judicial bodies.

require a three-part threshold test to demonstrate a violation of Section 2. The minority group must be able to demonstrate: that (1) it is sufficiently large and geographically compact to constitute a majority in a single-member district ("*Gingles* 1"); (2) it is politically cohesive ("*Gingles* 2"); and (3) the white majority votes sufficiently as a bloc to enable it -in the absence of special circumstances - usually to defeat the minority's preferred candidate ("*Gingles* 3"). *Gingles*, 478 U.S. at 50-52. Failure to establish any one of the three threshold criteria is fatal to Plaintiffs' case. *Overton*, 871 F.2d at 538.

4. However, Plaintiffs do not achieve victory by satisfying the three *Gingles* factors alone. *Monroe v. City of Woodville*, No. 88-4433, slip op. at 5571, (5th Cir. Aug. 30, 1989). Instead, Plaintiffs must prove under the totality of the circumstances that as a result[33] of the challenged at large

[33] In *White v. Regester*, 412 U.S. 755, 93 S.Ct. 2332, 37 L.Ed.2d (1973), the Supreme Court applied what has come to be known as the "results test" indicating that a violation of § 2 could be proved by showing discriminatory *effect* alone. (Emphasis added.) Congress made clear by the 1982 amendment to § 2 that the "results test" is the relevant legal standard to be applied by this Court.

system Plaintiffs do not have an equal opportunity to participate in the political processes and to elect candidates of their choice. *Id.* at 5571; *Gingles*, 478 U.S. at 44. The Senate Report which accompanied the 1982 amendment to § 2 specifies certain objective factors which typically may be relevant to a § 2 claim.[34] S. Rep. No. 97-417 (1982) (here-

[34] Typical factors include:

"1. the extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process;

"2. the extent to which voting in the elections of the state or political subdivision is racially polarized;

"3. the extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group;

"4. if there is a candidate slating process, whether the members of the minority group have been denied access to that process;

"5. the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process;

"6. whether political campaigns have been characterized by overt or subtle racial appeals;

"7. the extent to which members of the minority group have been elected to public office in the jurisdiction.

"Additional factors that in some cases have had probative value as part of [P]laintiffs' evidence to establish a violation are:

inafter S. Rep.). This list of factors is neither comprehensive nor exclusive.[35] "There is no requirement that any particular number of factors be proved, or that a majority of them point one way or the other." *Gingles*, *supra*, at 45 [*quoting* S.Rep. at 29].

5. *Gingles*, 1 requires proof that the minority population is sufficiently large and geographically compact to constitute a majority in a single member district. *Gingles*, *supra*, at 50. To satisfy the *Gingles* 1 requirement, Plaintiffs must be able to draw a single member district in which a majority of the voting age population is minority. *Overton*, 871 F.2d at 535. Plaintiffs have satisfied this requirement with regard to all of the nine target counties at issue in this

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"whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group.

"whether the policy underlying the state or political subdivision's use of such ... voting practice or procedure is tenuous." S.Rep. 417, 97th Cong., 2d Sess. 28-29 (1982), *reprinted in* 1982 U.S. Code Cong. Admin.News 177, 206-207.

[35] S. Rep. No. 97-417 (1982).

case. The minority population is sufficiently large and geographically compact to constitute a majority in at least one single member district; Black, Hispanic or combined, in each of the nine counties at issue in this case.

6. Evidence of racially polarized voting "is the linchpin of a ection 2 vote dilution claim," *Citizens For a Better Gretna v. City of Gretna*, 834 F.2d 496, 499 (5th Cir. 1987) and is relevant to establishing two of the three elements set forth in the *Gingles* decision - the minority groups political cohesiveness (*Gingles* 2) and the ability of the white majority usually to defeat the minority's preferred candidate (*Gingles* 3). *Westwego Citizens For Better Government v. Westwego*, 872 F.2d 1201, 1207 (5th Cir. 1989) [*citing Gingles*, *supra*, at 56]. These factors are usually established by statistical evidence of racially polarized voting by the voters in the relevant political unit. *Campos v. City of Baytown*, 840 F.2d 1240, 1243 (5th Cir. 1988), *reh'g denied*, 849 F.2d 1240, *cert. denied*, ___ U.S. __ (1989).

7. In analyzing statistical data, the best available data for estimating the voting behavior of various groups in the electorate would come from exit polls conducted upon a random sample of voters surveyed as they leave the polling place on election day, but such evidence was not introduced at trial. *See Chisom v. Roemer*, No. 86-4057, slip op. at 11 (E.D. La. Sep. 13, 1989) (*Chisom* II); Defendant-Intervenor Wood's Ex. 40. The best available data for estimating the participation of various groups in the electorate is sign-in data contained in the official records of registered voters. *Chisom* II, slip op. at 12. The best indicator of participation is obtained by dividing the number of persons who signed-in to vote by the number of persons in the voting age population. *Id.* at 12.

8. Absent an exit poll, sign-in data and voting age population data, analysts employ the bivariate ecological

regression technique to estimate the voting behavior of various groups in the electorate.[36] *Id.* at 12.

9. For purposes of political cohesiveness and racially polarized voting, examining only those elections that had a minority member as a candidate, is the proper method of analysis. *Campos*, 840 F.2d at 1245. In order to show cohesion, the proper standard is the same as *Gingles*: whether the minority group together votes in a cohesive manner for the minority candidate. *Id.*[37] In counties where Plaintiffs proceed on behalf of a combined minority, if the statistical evidence is that Blacks and Hispanics together vote for the Black or Hispanic candidate, then cohesion is shown. Of course, if one part of the group cannot be expected to vote

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[36] Like the Court in *Chisom II*, this Court is not convinced that precise correlation between the race of voters and their voting preferences can be made on the basis of the statistical analysis presented. However, no better data is provided, and the Court has given the statistical data considerable weight. *See Chisom II*, slip op. at 13.

[37] The Court in *Campos* rejected the City of Baytown's argument that in order to show cohesion when there are two minorities that make up the minority group, Plaintiffs must show first that Blacks are cohesive, next, that Hispanics are cohesive and finally, that Blacks and Hispanics together are cohesive. *Campos*, 840 F.2d at 1245.

with or does not vote with the other part, the combination is not cohesive. *Id.*

10. In evaluating the statistics necessary for Plaintiffs to prove racial bloc voting, this Court is bound by recent Fifth Circuit authority to consider statistical evidence from judicial elections and from exogenous elections.[38]

11. This Court is satisfied that the statistics relating to exogenous elections in the present case qualify as a sufficiently "local appraisal" to establish some degree of racial bloc voting.

12. This Court concludes under the controlling law that the statistical evidence furnished by the expert witnesses for Plaintiffs and Plaintiff-Intervenors to be legally competent

[38] *See Chisom II*, slip op. at 40; *Citizens for a Better Gretna*, 834 F.2d at 499. "Exogenous" elections are those which overlap the boundaries of the relevant unit. "Exogenous" elections are contrasted with "indigenous" elections which involve only the geographic unit at issue. *Westwego*, 872 F.2d at 1206, n. 10. County-wide elections represent the relevant geographic unit in the present case.

and highly probative. *Gingles*, 478 U.S. at 52-54; *Overton*, 871 F.2d at 537-540.[39]

13. The final determination, however, must be made by an evaluation of the "totality of the circumstances," including the factors listed in the Senate Report. *Westwego*, 872 F.2d at 1206. The Court must determine, on the basis of a "searching, practical evaluation," of past and present reality whether the political process is open to minority voters. *Gingles*, 478 U.S. at 45 [*quoting* S.Rep. at 30, U.S.Code Cong. & Admin.News 1982, p. 208]. Such a determination is dependent on the facts of each case and requires "an intensely local appraisal of the design and impact of the contested electoral mechanisms." *Gingles*, 478 U.S. at 79 [*quoting Rodgers v. Lodge*, 458 U.S. 613, 102 S.Ct. 3272, 73 L.Ed.2d 1012 (1982)]. The appraisal in this case must be

[39] Unlike the statistical analysis in *Overton*, Plaintiff and Plaintiff-Intervenors' experts in the present case established confidence levels of statistical significance and used consistent measures of minority voting strength. *Overton*, 871 F.2d at 537-540.

conducted on a district-by-district basis. *Gingles*, *supra*, at 59 n. 28 (the inquiry into the existence of vote dilution is district-specific).

14. This Court recognizes that judicial elections are characterized by less voter interest than high profile candidates receive at the top of the ticket. However, under the controlling law, party affiliation, straight party ticket voting and campaign factors do not constitute legally competent evidence in the present case. This Court rejects the State Defendants' argument that there can be no "functional view of the political process" without taking into account political party as the principal factor affecting such races. The Supreme Court in *Gingles* made clear that it is the difference between choices made by blacks and whites alone and not the reasons why they vote differently that is the central inquiry of § 2. *Gingles*, 478 U.S. 61-62.

15. Congress and the Courts have recognized that "political participation by minorities tends to be depressed

where minority group members suffer effects of prior discrimination such as inferior education, poor employment opportunities, and low incomes." *Gingles*, 478 U.S. at 69. Congress clearly concluded that provisions such as majority vote requirements, designated posts, and prohibitions against bullet voting could serve to further dilute the voting strength of minorities. *Id.* at 56; *Jones v. City of Lubbock*, 727 F.2d at 383 (finding that majority vote requirement further submerges political minorities).

16. This Court concludes that under the relevant law the at-large system for election State District Judges in the nine target counties interacts with social and historical conditions to cause an inequality in the opportunity enjoyed by black and white voters to elect their preferred candidates. *Gingles*, 478 U.S. at 47.

17. Defendants' lead expert, Dr. Taebel reviewed many selection contests which the Fifth Circuit determined are not germane to Voter Dilution Cases. Dr. Taebel analyzed

races in which Anglos opposed Anglos. *Campos v. City of Baytown*, 840 F.2d 1240, 1245 (5th Cir. 1988). Dr. Taebel also reviewed non-judicial elections.

18. Costly reorganization of the State at-large system of general and specialized Courts and disruption of County administrative duties such as jury selection are not sufficient grounds for maintaining an otherwise flawed system. *Westwego*, 872 F.2d at 1211 [*in reliance on Dillard v. Crenshaw County*, 831 F.2d 246, 250-51 (11th Cir. 1986)].

19. Congress did not contemplate that such considerations would play a role in determining whether there has been a violation of section 2. *Id.* at 1210-11.

20. On the strength of the evidence of racially polarized voting in the context of the "totality of the circumstances" test and considering the substantial evidence presented by Defendants to the contrary, this Court concludes that Plaintiffs have demonstrated a violation of § 2 of the

Voting Rights Act in each of the nine counties in question. *Westwego*, 872 F.2d at 1203 & 1209.

Fourteenth and Fifteenth Amendment Claims

21. Proof of racially discriminatory intent or purpose is required to show a violation under either the Fourteenth or Fifteenth Amendment to the United States Constitution. *Chisom II*, *supra*, at 41 [*citing: Kirksey v. City of Jackson, Miss.*, 663 F.2d 659 (5th Cir. 1981); *Washington v. Davis*, 426 U.S. 229, 239-41 1976)].

22. Proving racial discrimination as the motivating factor in a state legislative body "is often a problematic undertaking." *Hunter v. Underwood*, 471 U.S. 222, 227-28 (1985). Proof must be presented that the legislative body as a whole possessed the intent to discriminate. *Id.* at 229-32. It is impossible to conceive that four leading minority members of the State Senate would vote to send an

individiously discriminatory measure affecting the entire state to the voters with their own seal of approval on it.

23. Plaintiffs and Plaintiff-Intervenors failed to prove, as a matter of law, that the present at large system for electing State District Judges in the State of Texas was instituted with the specific intent to dilute, minimize or cancel the voting strength of Black and/or Hispanic voters. Accordingly, the Court is of the opinion that the following Orders are appropriate:

IT IS ORDERED that the present at-large system of electing State District Judges in the counties of Harris, Dallas, Tarrant, Bexar, Travis, Jefferson, Lubbock, Ector and Midland violates Plaintiffs' civil rights by unconstitutionally diluting the voting strength of Hispanic and Black electors in violation of Section 2 of the Voting Rights Act of 1965, as amended, 42 U.S.C. § 1973 (West Supp. 1989).

IT IS FURTHER ORDERED that Plaintiffs and Plaintiff-Intervenors request to Permanently Enjoin the State

of Texas from calling, holding, supervising or certifying any future elections for State District Judges under the present at large scheme in the target areas is taken under advisement. The Court recognizes the possibility that corrective relief may be available at a later date before future elections for State District Judges take place. *Chisom v. Roemer*, 853 F.2d 1186, 1189 (5th Cir. 1988).

The Court is hopeful that Governor Clements will include the issue of an alternative State District court election scheme as part of his call of the Special Legislative Session on November 13, 1989. Depending on the progress that is made in the Legislature, if any, prior to January 3, 1990, the Court will thereafter entertain a Restraining Order or Motion to Enjoin future State District Court elections pending the Remedy Phase of this litigation.

IT IS FURTHER ORDERED that the issues of Costs of Court and attorneys fees are expressly reserved until the conclusion of this litigation.

Chief Judge Charles Evans Hughes, in 1936, in an address to the American Law Institute, said:

> How amazing it is that, in the midst of controversies on every conceivable subject, one should expect unanimity of opinion upon difficult legal questions! In the highest ranges of thought, in theology, philosophy and science, we find differences of view on the part of the most distinguished experts -- theologians, philosophers, and scientists. The history of scholarship is a record of disagreements. And when we deal with questions dealing with principles of law and their application, we do not suddenly rise into a stratosphere of icy certainty.

This area of the law is not a sphere of icy certainty.

Should the Legislature fail to adopt a satisfactory Remedy in the Special Session (provided Governor Clements includes this matter in his call) this Court will consider the granting of an expedited appeal to the Fifth Circuit to determine whether or not the Declaratory Judgment of this Court was properly made.

SIGNED AND ENTERED this 8th day of November, 1980.

s/s
Lucius D. Bunton
Chief Judge

U.S. Department of Justice Civil Rights Division
Office of the Assistant Attorney General
Washington, D.C. 20530

Nov 5, 1990

Mr. Tom Harrison
Special Assistant for Elections
Elections Division
P. O. Box 12060
Austin, Texas 12060

Dear Mr. Harrison:

This refers to Chapter 632, S.B. No. 1379 (1989), which provides for the creation of fifteen additional judicial districts and the implementation schedule for the State of Texas, submitted to the Attorney General pursuant to Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. 1973c. We received your submission on October 2, 1990.

We have given careful consideration to the information in your submission, including all information contained in your earlier submission of Chapter 632, which was withdrawn by the state pending a decision by the court *en ban* in *League of United Latin American Citizens v. Clements*, No. 90-8014 (5th Cir. Sept. 28, 1990) and we have considered the information in that opinion, as well as prior court opinions in that case. In addition, we have considered information from the Census, along with comments and information from other sources.

The changes consist of the establishment of fifteen additional district court judgeships, denominated as separate Judicial Districts. Each judgeship is elected at large in the area of the court's jurisdiction, which consists of one or more

counties. Each judgeship is subject to the general requirement in Texas law that nomination for such position requires the obtaining of a majority of the vote in a political primary. Thirteen of these judgeships will have the same geographic jurisdiction as previously existing judgeships. In these cases, the election of judgeships by Judicial District operates as a numbered post requirement, eliminating any possibility of effective single-shot voting.

Our review of more recent materials shows that it is commonly understood among Texas legislators that the discriminatory impact of these features is present in the election of judges. Indeed, the legislative session which produced Chapter 632 (1989) included an address by the Chief Justice of the Texas Supreme Court and legislative committee discussions in which the discriminatory impact of these features was acknowledged. It appears that the proposed method of electing the judicial positions presently before us, which incorporates the very features understood to be discriminatory, took the form it did primarily because of the inability of legislators to reach a consensus regarding an alternative method of selecting judges that would be fair to racial and ethnic minorities.

Accordingly, with regard to the additional judgeships in Dallas, Lubbock, and Tarrant Counties in particular, the evidence clearly indicates that the at-large method of election, even considered in isolation from the numbered post and majority-vote features, produces a discriminatory result proscribed under Section 2 of the Voting Rights Act, 42 U.S.C. 1973c.

Under Section 5 of the Voting Rights Act, the submitting authority has the burden of showing that a submitted change has neither a discriminatory purpose nor a discriminatory effect. See *Georgia* v. *United States*, 411

U.S. 526 (1973); see also the Procedure for the Administration of Section 5 (28 C.F.R. 51.52). In addition, our guidelines provide that a submitted change may not be precleared if its implementation would lead to a clear violation of Section 2 of the Act. See 28 C.F.R. 51.55. Because we cannot conclude, as we must under the Voting Rights Act, that your burden has been sustained in this instance, and because our view is that use of the at-large election system with numbered posts and majority vote resulting in a clear violation of Section 2, I must, on behalf of the Attorney General, interpose an objection to the voting changes occasioned by Chapter 632, S.B. No. 1379 (1989) and the implementation schedule for those districts.

In reaching this decision, we are not unmindful of the recent decision of the Fifth Circuit Court of Appeals in *League of United Latin American Citizens* v. *Clements*, No. 90-8014 (Sept. 28, 1990) ("*LULAC*") (*en banc*) which held that the Section 2 results standard is not applicable to judicial elections. The *LULAC* court, however, expressly recognized that "Section 5 of the Act applies to state judicial elections" (Slip. op. at 20) and until this matter is clarified further by the courts we see no basis for altering our Section 5 procedural requirements insofar as they relate to Section 2.

We note that under Section 5 you have the right to seek a declaratory judgment from the United States District Court for the District of Columbia that the proposed changes have neither the purpose nor will have the effect of denying or abridging the right to vote on account of race, color, or membership in a language minority group. In addition, you may request that the Attorney General reconsider the objection. However, until the objection is withdrawn or a judgment from the District of Columbia Court is obtained, the changes to which we have objected continue to be legally unenforceable and should not be implemented in the

November 6, 1990, election. *Clark* v. *Roemer*, No. A-327 (U.S. Nov. 2, 1990) (copy attached). See also 28 C.F.R. 51.10 and 51.45.

To enable us to meet our responsibility to enforce the Voting Rights Act, please inform us of the action the State of Texas plans to take concerning this matter. If you have any questions, you should call George Schneider (202-514-8696), Attorney in the Voting Section.

Sincerely,

/s/ John R. Dunne
Assistant Attorney General
Civil Rights Division